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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SYCUAN BAND OF MISSION INDIANS,
Petitioner,
v.
EDWIN L. MILLER, individually and as District Attorney,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress intended that new technologies that enable an Indian Tribe to offer the same Class II game as is played with an older technology, but to more players, at lower cost, and with greater security, may only be employed if a Tribal-State compact is negotiated pursuant to the Indian Gaming Regulatory Act?

2. Whether Congress intended that a computerized video pull-tab dispenser, which the trier of fact found preserves all of the fundamental characteristics of the Class II game of pull-tab and "is itself the game of pull-tab", enables players to play the Class II game of pull-tab itself, such that the equipment constitutes "electronic, computer or other technologic" aids to the Class II game as contemplated by the Indian Gaming Regulatory Act, or rather constitutes a "facsimile" of the game, and thus is a Class III slot machine or "electronic or electromechanical facsimile" that can only be offered by the Tribe pursuant to a Tribal-State compact?

LIST OF PARTIES TO THE PROCEEDING

Sycuan Band of Mission Indians, a federally recognized Indian Tribe

Barona Band of Mission Indians, a federally recognized Indian Tribe

Viejas Band of Mission Indians, a federally recognized Indian Tribe

Edwin L. Miller, District Attorney, San Diego County, California

Jim Roache, formerly Sheriff of San Diego County, California

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Sycuan Band of Mission Indians ("Sycuan"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming that part of the judgment of the United States District Court for the Southern District of California denying Sycuan's motion to return certain electronic pulltab dispensers seized by Sheriff Deputies on the Sycuan Indian Reservation. Sycuan does not seek review of that portion of the judgment of the District Court that federal law preempts whatever jurisdiction the State of California and its subdivisions otherwise might have to enforce California's gambling laws in Indian country.

OPINIONS BELOW

The Order and Amended Opinion of the Ninth Circuit will be published as *Sycuan Band of Mission Indians v. Roache*, ____ F.3d ____, (9th Cir., April 28, 1995), and is reprinted as Appendix A.

The published opinion of the District Court, *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498 (S.D. Cal. 1992), is reprinted as Appendix B. Various other orders and opinions of the District Court are reprinted as Appendices C, D, E, F, G, H, I, and J, respectively.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of California entered its Memorandum Order and Decision on March 30, 1992. Appendix D; Appendix E. Both orders were incorporated into the stipulated order for entry of judgment filed on December 17, 1992. Appendix H. The United States Court of Appeals for the Ninth Circuit entered Judgment, affirming the District Court's judgment, on September 26, 1994. The Ninth Circuit denied Sycuan's timely Petition for rehearing and filed an Amended Opinion on April 28, 1995. Appendix A. On May 17, 1995, the Ninth Circuit granted Sycuan's motion to stay the issuance of mandate for thirty days in order that Sycuan might file a petition for writ of certiorari. The instant Petition is filed within ninety days of the April 28, 1995 denial of rehearing and entry of the Ninth Circuit's Amended Opinion.

Sycuan invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. Section 2701 et seq., provides in pertinent part:

§ 2701. Congressional findings

The Congress finds that —

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

. . . .

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2703. Definitions

. . . .

(7)(A) The term "class II gaming" means —

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) —

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that —

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is [sic] such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include —

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

. . . .

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

§ 2710. Tribal gaming ordinances

. . . .

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if —

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that

(i) the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization or entity, and

> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

The regulations of the National Indian Gaming Commission, 25 C.F.R. § 502.7, define "electronic, computer or other technological aid" to Class II bingo or lotto games as,

> . . . a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used —
>
> (1) Is not a game of chance but merely assists a player or the playing of a game;
>
> (2) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and,
>
> (3) Is operated according to applicable Federal communications law.

The Supremacy Clause of The United States Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

The issues raised by this Petition are signally appropriate for review by this Court at this time. A federal Court of Appeals has construed a critical provision of the Indian Gaming Regulatory Act ("IGRA"), which provision ex-

pressly permits the use of electronic, computer and other technologic aids in connection with the operation of Class II gaming activities, so as to *prevent* the use of such technology by the very Indian Tribes that Congress intended to protect and benefit by that provision. Ironically, the District Court, as trier of fact, adjudicated that the disputed machines offer an electronic version of pull-tab that is functionally identical to the traditional form of the Class II game of pull-tab, and "is itself the game of pull-tab." Appendix E at E-8. The State of California has offered the paper version of pull-tab through the State Lottery for many years, and also authorizes non-profit organizations to sell unlimited numbers of pull-tabs.

The Court of Appeals' construction of the statute directly conflicts with this Court's rule in *California v. Cabazon*, 480 U.S. 202 (1987), codified in IGRA, that an Indian Tribe may engage in gaming that the State permits or does not criminally prohibit. Although the decision is consistent with the decision of the Court of Appeals for the District of Columbia Circuit in *Cabazon Band of Mission Indians, et al. v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *certiorari denied*, 114 S.Ct. 2709 (1994) ("*Cabazon II*"), the decision conflicts with the holding of the Court of Appeal of the State of New Mexico, in which that Court determined that a paper ticket is not an essential element of the game of pull-tab. *Infinity Group, Inc., et al. v. Manzagol, et al.*, 884 P.2d 523, 526, 118 N.M. 632, *certiorari denied*, 882 P.2d 1046, 118 N.M. 533 (1994). Appendix M.

The Court of Appeals' construction of IGRA is contrary to the language of the statute, congressional intent, and the canons of construction for laws benefitting Tribes. If the decision stands, Indian Tribes in California and other States — especially Tribes in States that have subverted or stonewalled IGRA's Tribal-State compacting process by assert-

ing defenses based upon the Tenth and Eleventh Amendments to the Constitution in response to Tribal lawsuits brought under 25 U.S.C. § 2710(d)(7)[1], may be prohibited from offering on their Reservations new forms of Class II games that the trier of fact finds to be functionally identical to the traditional forms of Class II games. These versions of the Class II games offer the advantages of being more economical to operate, more attractive to customers, and far more easily monitored and regulated than the traditional forms of the games.

The impact of this decision on Tribal revenues and economic development — the *raison d'etre* of IGRA — will be devastating in California and any other State that will not negotiate with Tribes in good faith for Class III compacts that would authorize such equipment. *See, e.g., Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *certiorari granted*, ____ U.S. ____, 115 S.Ct. 932 (1995); *Spokane Tribe v. State of Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for certiorari pending.*

Because of the immense economic significance of this issue to Tribal governments throughout the nation, the matter should be resolved by this Court.

A. Jurisdiction of the Courts Below. Plaintiff and Petitioner Sycuan Band of Mission Indians, an Indian Tribe with a governing body duly recognized by the Secretary of the Interior, initially invoked the District Court's original jurisdiction pursuant to 28 U.S.C. Sections 1331, 1337 and 1362, in that Sycuan stated claims arising under federal law [the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.* ("IGRA")], an act regulating commerce between the States and Indian Tribes. Sycuan's complaint also alleged jurisdiction under 28 U.S.C. § 1343 of a claim

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[1] *See, e.g., Florida v. Seminole Indian Tribe*, 11 F.3d 1016, 1029 (11th Cir. 1994), *certiorari granted*, ____ US ____, 115 S.Ct. 932 (1995).

arising under 42 U.S.C. § 1983, in that Sycuan alleged that defendants acted under color of the laws of the State of California to deprive the Sycuan Band and its members of rights secured under the Constitution and laws of the United States.[2]

The Court of Appeals had jurisdiction of Miller's appeal (filed January 13, 1993) and Sycuan's cross-appeal (filed on January 28, 1993) pursuant to 28 U.S.C. § 1291.[3]

B. Reasons for Granting the Writ. Review of the present case is necessary to assure that Indian Tribes have the full benefit of the intent of Congress in defining "Class II" gaming to include the use of "electronic, computer or other technologic aids" in conjunction with such gaming activity. Granting review in this case is particularly appropriate because it presents the issue in its purest form: *I.e.*, the District Court specifically held that the pull-tab dispenser at issue not only is functionally equivalent to the traditional non-electronic version of the game already being offered when IGRA was enacted, but "is itself the game of pull-tab." Moreover, it is clear from the record in this case, as well as from the decision of another appellate court (*see Infinity Group, Inc. v. Manzagol, supra*) that the use of traditional paper tickets in the game of pull-tab is not an essential element of the game. This case therefore presents only the legal question whether, as a matter of law, the pull-

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[2] In its second amended complaint, Sycuan also invoked the district court's supplemental jurisdiction under 28 U.S.C. § 1367 of a claim for damages arising under State law, but so related to its federal claims that it formed part of the same case or controversy under Article III of the United States Constitution. However, because of the manner in which the action was resolved, the District Court did not rely upon either 28 U.S.C. § 1343 or § 1367 as a basis for exercising its jurisdiction, nor did it reach either the Band's civil rights or pendent State law claims.

[3] The Ninth Circuit's order of July 8, 1993, confirmed its jurisdiction of Sycuan's cross-appeal.

tab dispensers at issue are permissible as "computer, electronic or other technologic aids" to the Class II game of pull-tab, or are instead electronic "facsimiles" of a game of chance for which a Class III Tribal-State compact would be required.

The District Court conceded that the proper classification of the dispensers was "a close and hotly disputed question."[4] Although the Court of Appeals ultimately ruled against Sycuan on the classification issue, it expressly recognized the substantiality of Sycuan's position by acknowledging that language in IGRA "arguably sustains [Sycuan's] position," Appendix A at A-15, that the references in IGRA's legislative history to the intent of Congress that Tribes should not restrict Class II games to current technology "cuts both ways", *Id.* at A-18, and that "The Band's argument is not without force." *Id.* Moreover, at least one court of appeal has agreed with Sycuan's position.[5]

The issue is of immense importance not only to Sycuan, but also to Indian Tribes across the United States. As the Court of Appeals correctly noted, a Tribe cannot lawfully operate Class III gaming without either a Tribal-State compact or procedures prescribed by the Secretary of the Interior. The State of California refuses even to negotiate with Sycuan about a compact that would authorize the operation of Class III electronic gaming equipment. *See, e.g., Rumsey Indian Rancheria, et al, v. Wilson*, 41 F.3d 421 (9th Cir. 1994), petition for rehearing and suggestion for

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[4]March 30, 1992 Memorandum Decision Denying the Plaintiff's [Sycuan's] Motion for Summary Judgment, *etc.*, Appendix E at E-13.

[5]*Infinity Group, Inc., et al. v. Manzagol, et al., supra.* In that case, the court held that a paper ticket is not an essential element of the game of pulltab; rather, as contended by Sycuan, the New Mexico Court of Appeals found that the game consists "exactly these elements: 1) a finite number of prize cards; and 2) the distribution of those prize cards through a chance drawing by a player." 884 P.2d 523, at 525-26.

rehearing *en banc* pending. Other states also have refused to negotiate, or have erected jurisdictional obstacles to Tribal efforts to obtain judicial relief under IGRA. *See, e.g., Spokane Indian Tribe v. State of Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for certiorari pending; Florida v. Seminole Indian Tribe*, 11 F.3d 1016 (11th Cir. 1994), *certiorari granted*, ____ U.S. ____, 115 S.Ct. 932 (1995). Neither Sycuan nor any other Tribe would need a Tribal-State compact to operate pull-tab games using electronic, computer, or other technologic aids. Therefore, the indiscriminate, categorical inclusion in Class III of electronic pull-tab dispensers that preserve all of the fundamental characteristics of the game of pull-tab, but do not dispense preprinted paper tickets, would have a tremendous adverse economic impact on gaming Tribes.

C. Factual Background. The material facts discussed by the District Court in its December 9, 1991 Memorandum Decision re: Preliminary Injunction ("P.I.") (Appendix I), and its February 24, 1992 (Appendix B) and March 30, 1992 (Appendix E) memoranda of decision never have been in dispute. Those facts, together with other significant undisputed material facts in the record, are summarized as follows:

Sycuan is a federally recognized Indian Tribe, with a governing body duly recognized by the Secretary of the Interior. P.I. Appendix I at I-2; Miller's Answer to First Amended Complaint ("Answer") ¶3. The 640-acre Sycuan Indian Reservation is located in the unincorporated area of San Diego County. *Id.*

Sycuan established its gaming operation in 1983 in order to alleviate the severe economic depression, unemployment, substandard housing and sanitation conditions and other deprivations of even the most basic governmental services that had long afflicted the Reservation community. February 24, 1992 Memorandum of Decision ("2/24 Mem."),

Appendix B at B-2; 11/15/91 Declaration of Daniel J. Tucker ("Tucker Declaration"), Appendix K at K-3 – K-4. Sycuan has used the revenues from its Gaming Center to provide employment for Reservation residents and other Tribal members, as well as to fund a broad variety of vital governmental services and programs (including public safety and fire protection, medical, dental and ambulance service, educational scholarships, cultural, senior and nutritional programs, water and sanitation facilities and services, and housing development and rehabilitation). Appendix B at B-2 – B-3; Appendix K at K-4 – K-6.

The Sycuan Gaming Center is owned and operated by Sycuan. When this action arose, the Gaming Center offered its patrons Class II Bingo (including paper pull-tab games), Class II card games, Class III simulcast wagering on horseraces pursuant to an approved Tribal-State compact and, between June and October 30, 1991, pull-tab games played on Autotab Model 101 electronic pull-tab dispensers that Sycuan believes and contends are permissible electronic, computer or other technologic aids to the play of the Class II game of pull-tab. Appendix I at I-2. At that time, and today, the game of pull-tab is explicitly authorized in the State of California, *see*, Penal Code § 328.5(o), even though State law includes paper pull-tabs within the definition of "slot machines." Penal Code § 330c. Indeed, when the Autotab dispensers were installed at Sycuan, the distributor was licensed to install and maintain those same dispensers at non-Indian bingo halls in Los Angeles County. Tucker Decl., Appendix K at K-8.

The game of pull-tab is a form of bingo. 25 U.S.C. § 2703(7)(A)(i); Calif. Pen. Code § 326.5(o). Whether the player purchases a preprinted paper ticket from a floor clerk, or causes the Autotab Model 101 dispenser to display an electromagnetically stored ticket on a video screen, the game of pull-tab consists of a player purchasing what the

player hopes will be a winning ticket from a finite and fixed pool of tickets containing a fixed, predetermined number of winning tickets at fixed, predetermined and known prize levels; at least some of this information is available to the player when each ticket is purchased.[6] The concealed numbers or other symbols on the ticket are uncovered by the player or the dispenser to determine whether the combination of numbers or other symbols on the ticket entitles the player to claim a particular prize. March 30, 1992 Memorandum Decision ("3/30 Mem."), Appendix E at E-6; Henry Decl., Appendix L at L-2.[7]

Because the pool of tickets in a pull-tab game is finite and fixed, each game ticket sold reduces the total number of tickets remaining in the pool, and directly affects the chances of each subsequent play producing a winning ticket at a particular prize level; the finite pool also ensures that when all of the tickets in a given game have been sold, all of the winning tickets will have been distributed. 3/30 Mem., Appendix E at E-6; Henry Decl., Appendix L at L-2.

The Autotab Model 101 electronic pull-tab dispenser consists of an electrically-powered computer linked to a video monitor, a printer which prints and dispenses winning tickets at the request of the player and audit information at the request of the operator, and a locked receptacle into which money is deposited by players to activate the use of the dispenser. Henry Decl., Appendix L at L-4. The pull-tab

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[6]When the game is played with paper tickets, the player seldom knows how many tickets there originally were in the game. The Autotab Model 101 dispenser discloses this information to the player. November 14, 1991 Declaration of Harold Henry ("Henry Decl."), Appendix L at L-4 – L-5.

[7]None of the defendants in the district court disputed any of Sycuan's evidence about the nature of the game of pull-tab and the characteristics and manner of functioning of the Autotab Model 101 electronic pull-tab dispenser.

games that are available for play from the dispenser are contained in EPROM chips housed in cartridges that the operator plugs into the dispenser within a locked compartment. Unless properly coded and programmed cartridges have been plugged into the dispenser, the dispenser cannot be used to play any games. *Id.* at L-5; 3/30 Mem., Appendix E at E-6 – E-7.

Each Autotab Model 101 game cartridge is initially loaded with 24,000 tickets, evenly divided into one or more identical games. The cartridges are internally and externally serialized, epoxy sealed and fully encrypted. Each cartridge also contains the graphical symbols and a complete specification of the game, including the prices of tickets, the number of tickets, the number and amount of all prizes and combinations of prizes, and a variety of such potential limits and rules of play as may be required by the specific jurisdiction in which the dispensers are to be operated. Henry Decl., Appendix L at L-5; 3/30 Mem., Appendix E at E-6 – E-7.

The game cartridges containing the electronically-stored pull-tabs contain only data; the cartridges contain no computer codes, and thus cannot affect the play of the games in any way not predetermined and controlled by the design of the system. Henry Decl., Appendix L at L-5.[8]

To put the Autotab Model 101 dispenser into operation, the operator of the dispenser must properly set up the dispenser for the specific location in which it is to be used, and must use a key or coded password to explicitly open each game available for play. At that point, a dispenser that properly has been prepared for use loads the game from the cartridge, electronically "shuffles" the stored, predetermined

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[8]Unlike the New Mexico Court of Appeals in *Infinity*, neither the District Court nor the Court of Appeals seems to have understood or appreciated the significance of this fact.

ticket combinations and sets up the necessary data space to keep track of the game. The dispenser also records in the cartridge how and when the game was opened. *Id.* at L-6.

When a player approaches a Model 101 dispenser, the player first encounters an "idle" screen on which images from each of the installed cartridges rotate on the screen. When the player presses any button or inserts money, the screen changes to display the names, ticket prices and types of games contained in the installed cartridges. Upon selecting one of the games, the player is presented with a "flare" screen showing the details of the game's structure and winning prize combinations. If the player desires to play that game, the player presses the "Play" button. If enough money has been inserted to purchase a ticket for that game, the dispenser will subtract the price of a ticket from the player's credit balance and display an unopened ticket on the screen. By pressing the appropriate button, the player then may choose to open the ticket either tab-by-tab, or all at once. Henry Decl., Appendix L at L-7 – L-8.

If the opened ticket is a winner, the dispenser depicts a line being drawn through the winning combination(s) and plays a tune. If the prize is smaller than a designated amount (programmed into each cartridge individually), the player next must choose whether to collect the winnings by having the dispenser print out a winning ticket for redemption by a cashier, or by adding the winning amount to the player's credit balance. Prizes larger than the designated amount *must* be paid out in the form of tickets redeemable for cash. Prizes paid out as winning tickets are numbered, supplied with a security code for validation purposes, and printed on special security paper. All tickets printed out also are recorded on the log printer, and major prizes are logged to the cartridge as well. Cash flow information for the dispenser is tabulated on the hard counters, while more detailed accounting information for each game and for

various periods of operation is recorded in the dispenser's own memory. *Id.*

When a player purchases a ticket from the Autotab Model 101 dispenser, the dispenser uses a "random number generator" to select one of the tickets remaining in that game, thereby decreasing by one both the total number of tickets remaining and also the number of tickets remaining in one of the prize categories (including the "no-prize" category). *Id.* at L-6.

Because of the finite number of ticket combinations available for play in a given game, the fluctuation of odds as tickets are played is exactly the same as that which occurs when the game of pull-tab is played with paper tickets sold by a floor clerk or drawn from a container. *Id.*

As the play of the game of pull-tab on the Autotab Model 101 dispenser proceeds, the dispenser records the time and date of significant events associated with play in the cartridge (*e.g.*, all winning tickets, cash in, credits out, cumulative receipts, *etc.*). *Id.* at L-6 – L-7. The Autotab Model 101 dispenser automatically closes each game contained in a cartridge when the tickets remaining in that game have been exhausted. *Id.* at L-4 – L-5. When the dispenser closes a game, the dispenser records the time and date of closing and summary accounting data in three or four places, including the cartridge. When all the games on a cartridge have been played and closed, the cartridge is empty and must be replaced (it cannot be "restarted" or reshuffled). Even after removal, the cartridge retains all internal data for at least ten years following the date of manufacture. *Id.* at L-6 – L-7.

Unlike paper pull-tabs, which can be altered, lost or stolen, neither the pull-tabs stored in the cartridges nor the information recorded about each use of the dispenser can be altered by the operator, sales staff, or the player. *Id.* at L-4. Information concerning cash receipts, replays chosen in-

stead of credit payouts, total winnings, number of tickets sold and number of games closed is recorded in the dispenser on "hard" counters that cannot be reset. *Id.* at L-6 – L-7.

The dispenser's computer records and reports information about the dispenser's activity on daily, week-to-date, month-to-date, quarterly, year-to-date and cumulative-since-installation bases. The computer also records and reports complete audit information about each game contained in a cartridge; *i.e.*, the location and identification number of the dispenser, the name of the game, the date and time of the audit request, gross and net receipts, total number of pull-tabs in the cartridge, tickets played, tickets remaining, winning tickets dispensed, prizes won, prize money won and system errors. *Id.*

Upon entry of the appropriate command by operating personnel, the dispenser will produce a printed record of the play of all of the pull-tabs stored in each cartridge, thus enabling the play of the machine to be fully audited at all times. At no time does control over the computer's operation pass from the computer to the cartridge. *Id.* at L-7.

ARGUMENT

I.

THE AUTOTAB DISPENSERS DO NOT OFFER A CLASS III "FACSIMILE" OF THE CLASS II GAME OF PULL-TAB, BUT THE CLASS II GAME OF PULL-TAB ITSELF.

This Court ruled in *Cabazon v. California*, 480 U.S. 202 (1987), that an Indian Tribe may engage in gaming that the State permits or does not criminally prohibit. Congress codified this rule in IGRA. 25 U.S.C. section 2701(5). Congress expressly classified the game of pull-tab as Class II, 25 U.S.C. § 2703(7)(A)(i), for which no Tribal-

State compact need be negotiated. Indeed, the State of California has offered the paper version of pull-tab through the State Lottery for many years, and also authorizes non-profit organizations to sell unlimited numbers of pull-tabs. Penal Code § 326.5(o). There is no question about Sycuan's right to offer the paper version of the game without a compact.

In its Second Claim for Relief, Sycuan contends that the seized Autotab Model 101 electronic pull-tab dispensers are computer, electronic or other technological aids to the class II game of pull-tab, not Class III slot machines or electronic facsimiles of a game of chance. The evidence before the District Court was undisputed that these dispensers preserve all of the fundamental elements of the game of pull-tab, and enable players to play the game of pull-tab itself, not merely a copy of that game. *See supra*, Statement of Facts. Further, the manner in which the Autotab Model 101 electronic pull-tab dispenser is designed, programmed, and actually operates enhances not only the quality of the game for the players, but also the security, accountability and integrity of the game as compared to the game of pull-tab as played with paper tickets. *Id.* Indeed, the District Court adjudicated, based on the undisputed evidence, that the Autotab Model 101 dispenser "is itself the game of pull-tab." Appendix E at E-8. This finding is consistent with IGRA's classification as Class II of:

> (i) the game of chance commonly known as bingo (*whether or not electronic, computer, or other technologic aids are used in connection therewith*) —
>
> . . . .
>
> *including* (if played in the same location) *pull-tabs.*

25 U.S.C. section 2703(7)(A)(i) (emphasis added).[9]

Yet the District Court and the Court of Appeals both incongruously concluded that the Autotab dispensers nevertheless constitute Class III "facsimiles" of the Class II game of pull-tab pursuant to 25 U.S.C. section 2703(7)(B)(ii). This is a fundamental misapplication of the rule of *Cabazon* and the intent of Congress in codifying *Cabazon* in IGRA. The Autotab Model 101 functions in a manner demonstrably different from the "electronic facsimiles" that Congress intended to include in Class III.

The Court of Appeal erroneously concluded, as had the District Court, that the Autotab dispensers "present the player with 'electronic facsimiles' of the pull-tab game." The Court relied in large part on the dictionary definition of "facsimile" as "an exact and detailed copy of something." In treating the game offered by the dispensers as a "facsimile" of the game of pull-tab, the Court committed the same clear error as did the District Court and the Court of Appeals for the District of Columbia Circuit in *Cabazon Band v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *certiorari denied*, 114 S.Ct. 2709 (1994). The dispensers do not offer a copy of the game of pull-tab, *but the game of pull-tab itself*, because the game of pull-tab consists not of paper tickets, but of drawing chances from a finite pool of chances containing a fixed and predetermined number of winners at each prize level.

The game of pull-tab is not defined in IGRA or the definitional regulations of the National Indian Gaming Commission ("NIGC"). *See*, 25 C.F.R. Part 502. However, the record evidence in this case established without contra-

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[9] IGRA does not specify that the game of pulltab must be played with tickets made of any particular material, or any tangible tickets at all. Indeed, IGRA does not define the game of pulltab.

diction that the use or physical handling of game chances (referred to for convenience as "tickets") — whether made of paper or any other tangible medium — is not an element of the game at all:

> The essence of the game of pull-tab is that the player purchases what the player hopes will be a winning ticket from a finite pool of tickets containing a fixed, predetermined and known number of winning tickets at fixed, predetermined and known prize levels, and then reveals concealed numbers or other symbols on the ticket to determine whether the combination of numbers or other symbols entitles the player to claim a particular prize. The finite pool of tickets available to be played in each game is reduced with each additional ticket sale, such that when all of the game tickets have been sold, all of the winning tickets will have been distributed.

Declaration of Harold Henry, Appendix L at L-2. Thus, while the Court of Appeals apparently accepted the undisputed record that the Autotab dispensers retain the fundamental characteristics of the game of pull-tab, the Court's

reference to the "basic" game of pull-tab draws a distinction that has no legal[10] or factual basis.[11]

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[10] At least one appellate court has recognized that because the essence of the game of pulltab is in the finite pool of chances containing a fixed and predetermined number of winners, electronic/video pull-tab dispensers constitute the game of pull-tab itself, not a "facsimile" thereof. *See, Infinity Group, Inc., et al. v. Manzagol, et al., supra.* ["We do not believe, however, that because only the paper form of the game was in existence in 1981, only the paper form is permissible under the Act [New Mexico's Bingo and Raffle Act, NMSA 1978, §§ 60-2B-1 to -14]." [884 P.2d at 526. "We do not believe that physically handling cards is a fundamental characteristic of the game. Consequently, Plaintiffs' electronic games, which replicate all of the essential elements of pull tabs, are pull tabs as that game was commonly known in 1981, and as such are allowed under the Act." *Id.*

[11] The Court's characterization of the dispensers makes at least three critical factual assumptions that are completely unsupported by, or are contrary to, the evidence in the record. First, the game of pull-tab — regardless of medium with which played — does not require multiple players or *simultaneous* access to the pool of chances. *Infinity, supra.* For example, if only one floor clerk sells chances, or if each floor clerk sells chances from a different game, only one player at a time could participate in the game.

Second, even if only one player at a time can operate dispenser, the dispensers dispense game chances more quickly, less expensively and with far greater security than pre-printed paper tickets, thus facilitating greater game participation and assuring far greater game integrity.

Third, despite being more "glamorous and enticing" than paper pull-tabs, *Infinity, supra*, 884 P.2d at 527, the dispensers are "readily distinguishable from a game of chance on an electronic facsimile" in that the outcome of each play of an electronic or computerized facsimile of a slot machine is random and thus independent of every other play, while the outcome of each play of the Autotab 101 is directly influenced by each preceding play, the players know in advance how many chances there are in a game and how many winning chances there are at each prize level in each game, and at the end of the game all of the winning chances will have been distributed.

II.

CONGRESS DID NOT INTEND THAT "FINITE" VIDEO PULL-TAB DISPENSERS BE DEEMED CLASS III GAMING DEVICES, RATHER THAN PERMISSIBLE COMPUTER, ELECTRONIC OR OTHER TECHNOLOGICAL AIDS TO THE CLASS II GAME OF PULL-TAB.

The Court of Appeals, citing Webster's dictionary, found it "extremely difficult for us to conceive what Congress meant by the term "facsimile" if it does not include the games played by use of these machines." Appendix A at A-16. Both the plain language and legislative history of IGRA should have made it relatively easy for the Court of Appeals to discern that Congress did not intend to include within the meaning of "facsimile" electronic/video pulltab dispensers that preserve the fundamental characteristics of the game of pull-tab.

Although IGRA makes a clear legal distinction between technological aids to Class II games and Class III gaming devices, the statute does not set forth any criteria by which to make a bright-line distinction between the two kinds of gaming equipment.[12] Therefore, the status of finite pull-tab dispensers must be determined not only from the language of IGRA, but from IGRA's legislative history, informed by interpretations of the statute by the NIGC and the few

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[12] IGRA's differentiation between slot machines, on the one hand, and electronic facsimiles, on the other, strongly suggests that the slot machines referred to under IGRA are those defined and described in 15 U.S.C. Sec. 1171(a)(1); *i.e.*, a "machine or mechanical device an essential part of which is a drum or reel with insignia thereon." *See, Hannifin v. United States*, 248 F.2d 173, 175-177 (9th Cir. 1957).

courts that have addressed the Class II-Class III distinction.[13]

IGRA does not explicitly define "electronic, computer, or other technologic aids" that may be used in connection with "the game of chance commonly known as bingo" — including pull-tabs, lotto, punch boards (which California law includes within the definition of a slot machine), tip jars, instant bingo, and other games similar to bingo. Rather, 25 U.S.C. § 2703(7)(A) defines those terms solely by negative implication; *i.e.*, excluding from Class II gaming "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii).

IGRA's legislative history demonstrates that the logical standard to employ in determining whether or not the Autotab Model 101 is a mere technological aid to the Class II game of pull-tab, for which no Tribal-State compact is required, is whether it preserves the "fundamental characteristics" of the game. In other words, the court should have looked at the game itself, rather than the physical means by which the game is played. If a new technology enables a Tribe to offer exactly the same game as is played with an older technology to more players, at lower cost and with greater security, that technology should not be categorized as a Class III facsimile merely because it utilizes a computer and a video screen.

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[13] *E.g., Spokane Tribe of Indians v. United States*, 782 F.Supp. 520 (E.D. Wash. 1991), *aff'd*, 972 F.2d 1090 (9th Cir. 1992), which involved electronic devices used to play a game which the Tribe called "lotto." The court held that the "lotto" played on those devices was not "lotto" within the meaning of IGRA, but was "lotto" as that game is operated by the State Lottery. The court held that because the game itself is Class III, the devices used to play that game could not be defined as Class II technological aids.

In explaining the major provisions of S. 555 (ultimately enacted as IGRA), the Senate Committee stated:

> *Class II gaming* is defined in section 4(8)(A)(B)(C) and D1. Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in section 4(8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. *The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.* In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology *as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games* and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446, *supra*, at 3071, 3079 (emphasis added). IGRA's stated purposes, and the Senate Report's emphasis on preserving Tribal flexibility to utilize advances in gaming technology so long as such technology "does not change the fundamental characteristics of the bingo or lotto games" (one of which is that participants actually or potentially compete against other players,[14] rather than being pitted against the house in a purely random game), compels the conclusion that the Autotab dispenser's preservation of the "fundamental characteristics" of the game of pull-tab renders the dispenser a technologic aid to Class II gaming, rather than a Class III facsimile of a game of chance.

The Senate Report also clearly distinguishes between Class III gaming devices themselves and mere technologic aids to Class II games:

> The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. Sec. 1175. *That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto.* It is the Committee's intent that with the passage of this act, *no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction [sic] with bingo or*

[14] Although IGRA includes pulltab within the definition of bingo, the essential elements of the games differ in some material respects. In traditional bingo, numbers are drawn from a finite pool of numbers and called out to the players, who have game cards (whether tangible or on video display) with prenumbered squares. The game is won by the first player to call out when the drawn numbers match or "cover" a specified pattern on his/her card. If a player has a winning pattern but fails to call out before the next number is drawn, the player does not win. Thus, an essential element of traditional bingo is the simultaneous participation of multiple players. There is no such element present in pulltab, except that players — whether simultaneously or in sequence — compete to draw winning chances from a finite pool of chances.

> *lotto or other such gaming on or off Indian lands.* . . . However, it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act and the Marine [sic] Indian Claim Settlement Act.

Id. at 3082 (emphasis added) (citations omitted).

The Court of Appeals recognized that the legislative history supports the Band's position that the proper test for distinguishing between a permissible Class II technologic aid and a Class III electronic facsimile is whether the equipment preserves the fundamental characteristics of the Class II game (provided that the game itself is not Class III).[15] The Court of Appeals further concluded that the pull-tab dispensers may have the effect, over time, of broadening game participation. Appendix A at A-18. Nonetheless the Court of Appeals misinterpreted the Senate Report's reference to satellite communications technology (linking multiple Tribal bingo facilities), which was clearly intended by the Committee as one example of a technologic aid being used at the time to enlarge the scale of Tribal bingo operations. The Court of Appeals misconstrued this example, in effect *excluding* all other present or future forms of electronic, computer or other technologic aids that do not facilitate inter-facility communications. *Id.*

This crabbed construction of the statute eviscerates Congress' clearly-expressed intent that Tribes not be frozen into 1988 technology in conducting their Class II bingo and pull-tab activities. It also ignores Congress' equally clear admonition that courts interpreting IGRA should apply the canon

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[15] "This passage, it seems to us, cuts both ways. The Band's argument is not without force . . . " Appendix A at A-18.

of statutory construction requiring ambiguities in statutes enacted for the benefit of Tribes to be construed in the manner most beneficial to the Tribes. Remarks of Congressman Udall, Cong. Rec. H8153 (Sept. 26, 1988). *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *certiorari denied*, 429 U.S. 1038 (1976).

Adoption by this Court of the "fundamental characteristics" test urged by the Band would implement the clear intent of Congress as well as satisfy this Court's obligation to construe IGRA for the benefit of Tribes. The "fundamental characteristics" test also is completely consistent with the NIGC's definitional regulations. 25 C.F.R. Part 502, §§ 502.3(a), (b), 502.7.[16] 25 C.F.R. § 502.7 defines "electronic, computer or other technological aid" to Class II bingo or lotto games as,

> . . . . a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used —
>
> (1) Is not a game of chance but merely assists a player or the playing of a game;
>
> (2) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and,
>
> (3) Is operated according to applicable Federal communications law.

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[16]These definitions first were proposed after the October 30, 1991 San Diego County Sheriff's raid that gave rise to this action, and were adopted in final (and modified) form on April 2, 1992 — after the District Court held that the dispensers were Class III electronic facsimiles.

The NIGC's regulations define "electronic or electromechanical facsimile" as "any gambling device as defined in 15 U.S.C. Section 1171(a)(2) or (3)." Thus, a device which otherwise would be proscribed under 15 U.S.C. Sec. 1171(a)(2) or (3), whether it is a bingo blower, computer or video screen, is lawful if it is an electronic, computer or other technological aid to bingo or lotto.[17]

After correctly describing the game of pull-tab as played with paper tickets (Appendix E at E-6), accurately describing the Autotab Model 101 dispenser (*id.* at E-6 – E-7), and finding that the Autotab device "reproduces electronically the game of pull-tab *and is itself the game of pull-tab[,]*" *id.* at E-7 – E-8 (emphasis added), the District Court rejected the "fundamental characteristics" test mandated by IGRA and IGRA's legislative history. The District Court instead held, without factual or legal basis, that because the Autotab dispenser is "an electronic version of the paper version," it thus is a Class III electronic facsimile of the game of pull-tab.

The Court of Appeals compounded this error by affirming the District Court's judgment, even as it gave more credence to the Band's argument than had the Court of Appeals for the District of Columbia Circuit in *Cabazon II*, an action to which the Sycuan Band was not a party, and which did not involve the Autotab Model 101 pull-tab dispenser. This

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[17] Although an administrative agency's interpretation of the law that it is charged with administering is entitled to deference, federal courts should not merely stand aside and rubber-stamp an agency interpretation deemed inconsistent with a statutory mandate or that frustrates the congressional policy underlying the statute, nor will the courts defer to an administrative construction where there are compelling indications that it is wrong. *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.* 824 F.2d 710, 721 (9th Cir. 1987).

conclusion is squarely at odds with the NIGC's own definition of Class III electronic facsimiles, and the clear legislative history of IGRA.

CONCLUSION

The adverse economic consequences of the Court of Appeals' judgment for Sycuan and other Tribes in States that have resisted IGRA's Class III compacting process are so enormous, and the courts below have so clearly ignored or departed from the language and intent of IGRA and the legal principles acknowledged by this Court in *Cabazon v. California*, that only this Court can ensure that the intent of Congress will be fulfilled. Because federal law does not require that the game of pull-tab be played with paper or other tangible representatives of game chances, because IGRA must be liberally construed in favor of the Tribes, *see, e.g., Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) and Remarks of Congressman Udall, Cong. Rec. H8153, Sept. 26, 1988, and because the Autotab Model 101 dispenser "is itself the game of pull-tab" (Appendix E at 9:12), this Court should grant the Petition and reverse that portion of the Court of Appeals' Opinion affirming the District Court's conclusion that Sycuan's Autotab Model 101 pull-tab dispensers are Class III electronic facsimiles of the game of pull-tab.

Dated: June 12, 1995

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYCUAN BAND OF MISSION INDIANS; BARONA BAND OF MISSION INDIANS, a/k/a BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe; VIEJAS BAND OF MISSION INDIANS, a/k/a VIEJAS GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,
Plaintiffs-Appellees,

v.

JIM ROACHE, individually and as Sheriff of San Diego County,
Defendant,
and
EDWIN L. MILLER, individually and as District Attorney of San Diego County,
Defendant-Appellant.

SYCUAN BAND OF MISSION INDIANS,
Plaintiff-Appellant

v.

JIM ROACHE,
Defendant,
and
EDWIN L. MILLER, individually and as District Attorney of San Diego County,
Defendant-Appellee.

No. 93-55430

D.C. No.
CV-91-01648-MLH

ORDER AND AMENDED OPINION

Appeals from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted
June 8, 1994 — Pasadena, California

Filed September 26, 1994
Amended April 28, 1995

Before: Betty B. Fletcher, William C. Canby, Jr., and
Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Government Law/Native Americans/Business Law

The court of appeals affirmed a judgment of the district court. The court held that state officials are barred by the Indian Gaming Regulatory Act from prosecuting tribal gaming officials for violations of state law against electronic machine gambling.

San Diego County Sheriff's deputies obtained search warrants and raided gaming centers on reservations of the Sycuan, Barona and Viejas Bands of the Mission Indians. They seized gaming machines and other evidence. The District Attorney prosecuted gaming center employees for violating state laws against electronic machine gambling.

The Tribes obtained declaratory and injunctive relief in the district court, which held that the county officials were precluded by the Indian Gaming Regulatory Act (IGRA) from jurisdiction to execute the warrants or prosecute the

gaming officials. The court also ruled that the Sycuan Band was not entitled to the return of the seized video pull-tab machines were Class II gaming devices that required authorization by a Tribal-State compact. To the State's contention that injunctive relief violated the Anti-Injunction Act, the court rejoined that its injunction was within two exceptions to the statute: it was necessary to preserve federal jurisdiction over Indian gaming and it was authorized by an act of Congress. Both sides appealed.

The State contended that the district court was not authorized to issue an injunction, that the injunction violated the Anti-Injunction Act and the *Younger* abstention doctrine. The Sycuan Band contended that its video pull-tab machines were not Class III gaming devices.

[1] The district court had authority for its conclusion that the State lacked jurisdiction to enforce its criminal laws against electronic machine gambling. IGRA contains an explicit limitation on jurisdiction to enforce state laws: the United States has exclusive jurisdiction of criminal prosecutions for violations of state gambling laws in Indian country unless the tribe agrees otherwise in a compact with the state.

[2] The State did not have jurisdiction under Public Law 280, which left civil regulatory jurisdiction in the hands of the Tribes. **[3]** This is so even If regulatory aspects of the statute are enforced by criminal penalties. The key is whether the conduct violates the state's public policy. **[4]** California regulates rather than prohibits gambling. It cannot alternately regulate and prohibit, turning its public policy off and on by degrees. **[5]** If the Bands' electronic pull-tab machines were Class III gaming devices, IGRA makes the State's law against them applicable in Indian country and grants the federal government the exclusive power to enforce that law.

[6] The injunction was necessary to preserve exclusive federal jurisdiction; the exception to the Anti-Injunction Act applied.

[7] Under *Younger v. Harris,* 401 U.S. 37 (1971), abstention is appropriate if there are ongoing state judicial proceedings implicating an important state interest that afford an adequate opportunity to raise federal questions. The State failed to show a legitimate interest in intruding on the federal government's exclusive jurisdiction to prosecute.

[8] The Band's machines present the player with "electronic facsimiles" of the pull-tab game that are included in Class III because they are excluded from Class II. **[9]** The district court did not err in ruling that they cannot be employed in the absence of a Tribal-State compact.

COUNSEL

Cathy Christian, Manuel Medeiros, Deputy Attorneys General, Sacramento, California, for the defendant-appellant-cross-appellee.

George Forman Alexander & Karshmer, Berkeley, California; Art Bunce, Escondido, California, for the plaintiffs-appellees-cross-appellants.

ORDER

The following amendments are made to the opinion filed September 26, 1994.

At slip op. p. 11593, last paragraph, the sentence immediately after the indication of footnote 2 is changed so that it begins: "We express no opinion concerning Class III, but at least insofar as the State's argument is directed at Class II-type gaming, of the sort . . ."

At slip op. p. 11599, the sentence immediately following the last indented statutory quotation, and the citation that

follows that sentence, is changed to read: "If the machines in dispute here are excluded from Class II, they fall within Class III, *id.* § 2703(8), and can be operated by the Band only pursuant to a compact or to procedures prescribed by the Secretary of Interior, *Id.* §§ 2710(d)(1)(C); 2710(d)(7)(B)(vii)(II)."

At slip op. p. 11598, the last sentence of the first full paragraph is changed to end as follows: ". . . the video pull-tab machine is supplied with a computer-chip cartridge that insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes; when all tickets have been played, all the prizes will have been awarded."

The petition for rehearing is denied.

OPINION

CANBY, Circuit Judge.

This appeal presents a conflict over the power of state authorities to prohibit certain forms of Indian gaming. Edwin L. Miller, the District Attorney of San Diego County, California (the State), appeals the district court's injunction forbidding the State's prosecution of certain individuals employed in Indian gaming operations on the reservations of the Barona, Sycuan and Viejas Bands of Mission Indians. On cross-appeal, the Sycuan Band challenges the district court's finding that its video "pull-tab" machines offer Class III games that were operated in violation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. We affirm the district court's judgment in all respects.

I. Background

After obtaining search warrants in the San Diego Municipal Court, sheriff's deputies raided gaming centers operated

by the Barona, Sycuan, and Viejas Bands of Mission Indians on their reservations. The deputies seized gaming machines, cash and records. A short time later, District Attorney Miller commenced prosecutions of four persons employed in the Bands' respective gaming centers. The Bands brought actions in the district court for declaratory relief and injunctions against the state prosecutions.

The district court granted declaratory and injunctive relief in favor of the Bands. *See* 788 F. Supp. 1498 (S.D. Cal. 1992). It declared that the county officials were precluded by the Indian Gaming Regulatory Act (IGRA) from jurisdiction to execute the warrants and prosecute the tribal gaming officials. Accordingly, it enjoined the pending prosecutions of these individuals.

The district court denied, however, the Sycuan Band's motion to return the seized gaming devices. The district court found that the Band's video pull-tab machines were Class III gaming devices that could be lawfully operated only if authorized by a Tribal-State compact. Because there was no such compact, the district court eventually ordered the San Diego County Sheriff, pursuant to a stipulation, to return the gaming devices to Video Autotab, Inc., the owner and lessor of the gaming devices.

The State appeals from the district court's injunction, contending that 42 U.S.C. § 1983 failed to authorize the court to issue an injunction; that the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283; and that the injunction violated the *Younger* abstention doctrine. Finally, the State appeals the ruling that it has no criminal jurisdiction over the gambling offenses at issue.

On cross-appeal, the Sycuan Band contends that the district court erred in finding that the Band's video "pull-tab" machines are Class III gaming devices. Before reaching that issue, we address the State's appeal.

II. The District Court's Authority to Enter an Injunction

The State argues that 42 U.S.C. § 1983 cannot support the district court's injunction because the Bands are not "persons" for purposes of that section. We agree with the Sycuan Band, however, that there is no need for us to reach that question.[1] The Bands alleged jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1362, and the State did not contest those bases of jurisdiction. Section 1331 is enough; this case clearly arises under federal law, be it IGRA or the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes, and the states. *See National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 850-53 (1985).

The State attacks the standing of the tribe to seek an injunction that, among other things, enjoins the prosecution of third parties. The State candidly admits, however, that this argument was not raised in the district court. The argument is therefore waived and we will not entertain it unless the defect in standing deprives us of jurisdiction for lack of a case or controversy. *See Barrows v. Jackson,* 346 U.S. 249, 257 (1953) (rule denying standing to raise another's rights is "only a rule of practice," which may be dispensed with in appropriate cases). We have no doubt that we have before us a case and controversy between the Bands and the state authorities. The State's prosecutions, although directed immediately at the individuals conducting the tribal gaming operation, are aimed at stopping the Bands' machine gaming in its tracks. The Bands here are in no different position from that of the Mescalero Tribe in *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). In that case, the Tribe brought an action against New Mexico to enjoin

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[1] The Barona and Viejas Bands state that they seek attorneys fees for this appeal under 42 U.S.C. § 1988. That request is hereby transferred to the district court, which has not yet ruled on the Bands' request for fees in that court or on the applicability of section 1988 to this litigation.

enforcement of the State's game laws against non-Indian hunters and fishers on the Tribe's reservation. *Id.* at 329-30. The lower court issued the injunction and the Supreme Court upheld it. *Id.* at 343. We therefore see no constitutional or other jurisdictional problem in enforcing the district court's injunction in this case.

[1] On the merits, the district court had strong authority for its conclusion that the State lacked jurisdiction to enforce its criminal laws against electronic machine gambling. IGRA extends state laws punishing certain types of gambling into Indian country, 18 U.S.C. § 1166(a),(b),(c), but it also contains a highly explicit limitation on jurisdiction to enforce those laws:

> The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact . . . has consented to the transfer to the State of criminal jurisdiction with respect to the gambling on the lands of the Indian tribe.

18 U.S.C. § 1166(d). The Bands have not consented to the transfer of criminal jurisdiction to the State. As far as IGRA is concerned, therefore, the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming. Having correctly so concluded, the district court was well within its equitable power to enjoin the prosecutions, *see, e.g., Mescalero Apache Tribe, supra,* unless some federal statute or decisional law affirmatively bars the injunction. We discuss those questions below, but first we deal with a final substantive contention of the State.

III. IGRA, Public Law 280 and State Criminal Jurisdiction

The State points out that section 1166(d) provides for exclusive federal enforcement of state criminal laws "made

applicable *under this section* to Indian country." 18 U.S.C. § 1166(d) (emphasis added). It argues that California had preexisting authority to enforce its criminal laws in Indian country under Public Law 280, 18 U.S.C. § 1162. Accordingly, the State contends that the prosecutions were lawfully maintained under the State's Public Law 280 jurisdiction.

[2] We reject the State's arguments for two reasons. First, we do not agree that the State had jurisdiction over the Bands' gaming activities under Public Law 280. That statute granted California and certain other states jurisdiction over criminal violations and civil causes of action on Indian reservations. It left civil regulatory jurisdiction in the hands of the Tribes. *Bryan v. Itasca County,* 426 U.S. 373, 385, 388-90 (1976) (construing § 4 of Public Law 280, 28 U.S.C. § 1360).

[3] In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208-II (1987), the Supreme Court made it clear that state law in a Public Law 280 state may be excluded from Indian country as "regulatory" even though the regulatory aspects of the law are enforced by criminal penalties. The key is "whether the conduct at issue violates the State's public policy." *Id.* at 209. In *Cabazon Band,* the Supreme Court undertook this inquiry in regard to California's attempt to ban high-stakes bingo and certain card games in Indian country, and concluded that the State had no public policy against the gambling: it simply regulated it. *Id.* at 211. Accordingly, California could not prohibit the games in issue, carried on by the Bands in Indian country.

[4] The State here points, however, to the Supreme Court's statement in *Cabazon* that "applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory." *Id.* at 211 n.10. The State argues that *Cabazon Band* does not control this case, because the issue here is not bingo or card games, but electronic machine gambling that California permits

nowhere. We conclude, however, that the State's argument is useful only when applied to the distinctions between classes of gambling set up by IGRA.[2] We express no opinion concerning Class III, but at least insofar as the State's argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in *Cabazon Band,* the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees.[3] *Cabazon Band* addressed the problem at a higher level of generality than that. The essence of the Supreme Court's holding in *Cabazon Band* was succinctly set forth by the Court:

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular . . . [Accordingly], there is no warrant for California to make arrests on reservations and . . . enforce its gambling laws against Indian tribes.

Id. at 211, 214. The ruling, after careful analysis of particular laws, was generic: "California regulates rather than prohibits *gambling in general* and bingo in particular." *Id.* (emphasis added). The State has shown us no determinative changes in California public policy since *Cabazon Band,* and that decision controls. Its import is clear. California had no Public Law 280 jurisdiction to enforce its gambling laws against the gaming operations of the Barona, Sycuan, or

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[2] Admittedly, this approach fuses to some degree the analysis under Public Law 280 with that under IGRA, but the result is consistent with IGRA's purpose. among others, of "the establishment of Federal standards for gaming on Indian lands." 25 U.S.C. § 2702(3).

[3] Under IGRA, tribes may elect to engage in Class II gaming if located "within a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A).

Viejas Indian Reservations, at least insofar as the Bands were engaged in the type of gaming that would fall within Class II of IGRA.

[5] If, on the other hand, the state prosecutions are directed solely at gaming devices that IGRA would classify under Class III (as we hold below the electronic pull-tab games to be), then the effect of IGRA itself is to preclude the state prosecution. IGRA provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country" in the absence of a compact providing for state jurisdiction. 18 U.S.C. § 1166(d). The State emphasizes "made applicable under this section" and draws an implication that, if it can find another source (Public Law 280) making its laws applicable in Indian country, then it can prosecute violations. But that conclusion does not follow, nor is it a sensible application of section 1166(d). If, as we hold below, the Bands' electronic pull-tab machines are Class III gaming devices, then section 1166(d) makes the State's law against such machines applicable in Indian country. Section 1166(d) also grants the federal government exclusive power to enforce *that law*. Even if there were some other route making that same state law applicable in Indian country, the federal government's right to enforce *that law* is still exclusive. If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by section 1166(d). *See United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss,* 927 F.2d 1170, 1176-81 (10th Cir. 1991) (IGRA § 1166(d) occupies Indian gaming field to exclusion of Assimilative Crimes Act, 18 U.S.C. § 13, and its incorporation of state law). Whether IGRA has made broader inroads on Public Law 280 we need not decide; it has clearly made criminal enforcement of the State's laws

prohibiting "slot machines" the exclusive province of the federal government.

The district court accordingly did not err in rejecting the State's argument that Public Law 280 authorized the state prosecutions of the Bands' gaming officials.

IV. Anti-Injunction Act

The State next contends that, even if its courts were without jurisdiction as a matter of substantive law, the district court was precluded by procedural bars or doctrines from enjoining, the state prosecutions. The first such bar urged by the state is the Anti-Injunction Act. Under that Act, federal courts are barred from enjoining state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Because 18 U.S.C. § 1166(d) mandates exclusive federal jurisdiction over the criminal enforcement of Class III state gaming laws in Indian country, the state court proceedings were in derogation of federal jurisdiction. Accordingly, the district court held that the injunction was within two exceptions to the Anti-Injunction Act: it was necessary to preserve federal jurisdiction over Indian gaming and it was "authorized by Act of Congress".[4]

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[4]The State seeks at once to distinguish and obtain support from *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301 (9th Cir. 1988). In that case, we held that an injunction against a state proceeding that might have affected Indian property survived the Anti-Injunction Act because the "district court has jurisdiction to preserve the integrity of tribal claims." *Id.* at 1304. Thus, it fell within the exception for injunctions "necessary in aid of [federal court] jurisdiction." However, we overturned the district court's injunction as improvidently granted because, on closer examination, no Indian property was actually subject to the suit.

Here, state officials took action in derogation of exclusive federal jurisdiction, transgressing the principle of comity between the state and federal government embodied in the Anti-Injunction Act. The individuals prosecuted were principally involved in administering Indian gaming operations and, thus, the actions violated the clear mandate of *Cabazon Band* and § 1166(d).

[6] The injunction was necessary to preserve exclusive federal jurisdiction. The exception applies. *See, e.g., Capital Service, Inc. v. NLRB,* 347 U.S. 501 (1954) (federal injunction against enforcement of state court order in labor dispute fell within exception because federal law preempts state jurisdiction over unfair labor practices). Because the "necessary in aid of jurisdiction" exception applies, we need not consider whether the "authorized by Act of Congress" exception applies independently. The Anti-Injunction Act did not bar the relief given by the district court.

V. *Younger* abstention

[7] Abstention pursuant to *Younger v. Harris,* 401 U.S. 37 (1971), is appropriate if, first, there are ongoing state judicial proceedings; second, the proceedings implicate an important state interest; and third, there is an adequate opportunity in the state proceedings to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982).

The State fails to meet the second requirement. It is true that, under § 1166(a), all state Class III gambling laws "apply in Indian country in the same manner and to the

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Smith Plumbing concerned tribal property claims that the district court believed were in jeopardy absent an injunction. The facts here are different because no property subject to federal court jurisdiction is at stake in a criminal prosecution. Nevertheless, the injunction obtained by the Bands in this case fits well within the language of the exception.

same extent as such laws apply elsewhere in the State." But in the same breath, Congress granted the United States exclusive jurisdiction to enforce those state laws. 18 U.S.C. § 1166(d). While the State may well have an interest in seeing that the federal government enforces the State's laws in Indian country, it can have no legitimate interest in intruding on the federal government's exclusive jurisdiction to prosecute. *Younger* abstention is not appropriate in a case in which a "state tribunal is acting beyond its authority." *Gartrell Const., Inc. v. Aubry,* 940 F.2d 437, 441 (9th Cir. 1991).

The Tenth Circuit reached the same conclusion under nearly identical circumstances in *Seneca-Cayuga Tribe v. Oklahoma, ex rel. Thompson,* 874 F.2d 709 (10th Cir. 1989). That decision upheld a district court's injunction against a state court proceeding in which the state sought to enjoin operation of a tribal bingo game. The court of appeals pointed out that the threshold jurisdictional issue, whether the State had authority to regulate, was a question of federal, not state law. *Id.* at 714. As a consequence, *Younger* abstention was not warranted. *Id.*

Here, too, the threshold issue of the State's jurisdiction to prosecute is a matter of federal, not state, law. The district court correctly declined the invitation to abstain under the *Younger* doctrine.

VI. Classification of video pull-tab as a Class III game

In its cross-appeal, the Sycuan Band contests the district court's rulings that its pull-tab machines were Class III gaming devices. The "Autotab Model 101 electronic pull-tab dispenser" is a self-contained unit containing a computer linked to a video monitor and a printer. The player inserts money and sees a video reproduction of a paper pull-tab ticket. The player electronically reveals concealed numbers to determine whether he or she is a winner. If a winner, the

player may cause the machine to print out a winning ticket for redemption by a cashier or may add the winning amount to a credit balance for further play. The game retains the fundamental characteristics of the paper version of pull-tab: the video pull-tab machine is supplied with a computer-chip cartridge that insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes; when all tickets have been played, all the prizes will have been awarded.

Under IGRA, the basic game of pull-tab falls within Class II. Class II includes "the game of chance commonly known as bingo . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. § 2703(7)(A)(i). There is no question, therefore, that if the Sycuan Band were selling tickets on a board or in a deck from which the player peeled off a paper pull-tab, thus revealing whether he or she won a prize, the game would be a Class II game and California, which permits bingo and other gaming for some purposes, could not prohibit it. The dispute in this case arises, however, from the fact that the Bands' pull-tab games are entirely contained within electronic machines. The Sycuan Band and the State draw different conclusions from that fact, and each points to language in IGRA that arguably sustains its position.

[8] The Band relies on the parenthetical expression following the listing of "bingo" as a Class II game in IGRA:

> (i) the game of chance commonly known as bingo *(whether or not electronic, computer, or other technologic aids are used in connection therewith)* —
>
> * * *
>
> including (if played in the same location) pull-tabs . . .

Id. (emphasis added). The State, on the other hand, relies on language following shortly thereafter:

> (B) The term "class II gaming" does not include —
>
> * * *
>
> (ii) *electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.*

Id. § 2703(7)(B)(ii)(emphasis added). If the machines in dispute here are excluded from Class II, they fall within Class III, *id.* § 2703(8), and can be operated by the Band only pursuant to a compact or to procedures prescribed by the Secretary of Interior. *Id.* §§ 2710(d)(1)(C); 2710(d)(7)(B)(vii)(II). Our task, therefore, is to determine whether the machines in issue here are "electronic [or] computer . . . aids" to the game of pull-tab, or instead offer "electronic facsimiles" of that game.

We conclude that the machines present the player with "electronic facsimiles" of the pull-tab game. We do so in part because it is extremely difficult for us to conceive what Congress meant by the term "facsimile" if it does not include the games played by use of these machines. The first dictionary definition of "facsimile is an exact and detailed copy of something." *Webster's Third New International Dictionary* 813 (1976). The pull-tab machines present self-contained computer games copying the pull-tab principle, and they are played electronically. The District of Columbia Circuit, presented with the same question facing us, came to the same conclusion we do. *Cabazon Band of Mission Indians v. National Indian Gaming Commission,* 14 F.3d 633 (D.C. Cir.), *cert. denied,* 114 S. Ct. 2709 (1994). "As commonly understood, facsimiles are exact copies, or duplicates. Although there may be room for a broader interpretation of 'facsimile,' the video version of pull-tabs falls within the core meaning of electronic facsimile." *Id.* at 636. In contrast, as the District of Columbia Circuit also recog-

nized, an "electronic aid" to a Class II game can be viewed as a device that offers some sort of *communications* technology to permit broader participation in the basic game being played, as when a bingo game is televised to several rooms or locations. *See id.* at 637.

The Sycuan Band argues a contrary conclusion from the same facts. It contends that the machines are mere "aids" *because* the electronic games *are* exact duplications of the paper pull-tab game. The Band relies on the Senate committee report for the bill that was to become IGRA:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different Slates, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among Reservations can he made practical by use of computers and telecommunications technology *as long as the use of such technology does not change the fundamental characteristics* of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in

> which a single participant plays a game *with or against a machine rather than with or against other players.*

S. Rep. No. 100-446, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3079 (emphasis added). This passage, it seems to us, cuts both ways. It supports the Band's argument that electronic devices are permissible "aids" if they do not alter the "fundamental characteristics" of the game. The Band emphasizes that the computer in electronic pull-tab games duplicates the characteristics of the original game: there are a certain preestablished number of winning tickets and the prizes are known and fixed in advance. Thus, the Band argues, the player plays not against the machine using random odds, but against other players in a closed board.

The Band's argument is not without force, but the passage from the Committee report also reinforces the notion that electronic aids are essentially aimed at communications to enable broader participation in a common game. The pull-tab machines have that effect over time, perhaps, but any given player is faced with a self-contained machine into which he or she places money and loses it or receives winning tickets after the electronic operations are conducted.[5] In that sense, the gambler plays "with the machine" even though not against it. The machine is not being used to facilitate "[s]imultaneous games participation between and among Reservations" or even among players on

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[5] In the only other case in which we faced the question whether an electronic machine was an "aid" or a "facsimile," we thought it significant that "[t]he player can participate in the game whether or not anyone else is playing at the same time." *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992). We do not rely on *Spokane Tribe*, however, because it dealt with a lottery game in which the player did play a game of random chance against the machine, and we also determined that the underlying lottery game itself was Class III gaming. *Id.* at 1093-95.

the same reservation. In any event, whatever the implications of the Senate Committee report, we are still left with the statute's plain term "electronic facsimile" (to say nothing of "slot machines of any kind") that is excluded from Class II gaming. That language compels our result.

The Sycuan Band questions why Congress would permit as Class II gaming the traditional pull-tab game (with electronic aids to widen participation) and prohibit the same game played entirely electronically in stand-alone machines. We cannot and need not answer that question definitively; Congress has sufficiently dictated the result of this case in the statutory language it chose. It is not inconceivable, however, that Congress had in mind the view that, in casino gambling, the package is part of the product, and that a game wholly contained in a coin-activated machine is a somewhat different product from the same game in live form carried on with the aid of video or computer transmission. At least, Congress could rationally have so found.

Finally, we note that our conclusion that these machines offer an "electronic facsimile" of pull-tab is not inconsistent with the regulations devised by the National Indian Gaming Commission to assist in defining Class II games. Under 25 C.F.R. part 502.7, an electronic aid to a Class II game is "a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used — . . . (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile[.]" The pull-tab machines in issue here are not, in our view, readily distinguishable from a game of chance on an electronic facsimile.

[9] We affirm, therefore, the district court's ruling that the Autotab Model 101 video pull-tab machine is "an electronic or mechanical facsimile of a game of chance," properly categorized as Class III under 25 U.S.C.

§ 2703(7)(B)(ii). The Band cannot employ them in the absence of a Tribal-State compact.[6]

VII. Conclusion

The district court correctly ruled that the State was without jurisdiction to prosecute the Bands' officials for the Bands' conduct of gaming on their reservations. Its injunction was within its equitable power and did not violate the Anti-Injunction Act or the *Younger* abstention doctrine. The district court also did not err in ruling that operation of the Bands' electronic pull-tab machines constituted Class III gaming under IGRA.

The Barona Band and Viejas Band are entitled to their costs on appeal. The Sycuan Band and the State will each bear their own costs. With regard to both the appeal and the cross-appeal, the judgment of the district court is

AFFIRMED.

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[6]There is one other route by which Indian tribes can maintain Class III gambling. If the state fails to bargain in good faith and a federal court orders mediation, and the state fails to enter the compact chosen by the mediator, the Secretary may prescribe procedures under which the tribe may conduct Class III gaming. 25 U.S.C. § 2710(d)(7)(11)(vii)(II). The record does not show that any of the prerequisites for this procedure exist in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

vs.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)
CONSOLIDATED WITH 91-1669 H (BTM)

MEMORANDUM DECISION GRANTING THE PLAINTIFFS' MOTION FOR A DECLARATORY JUDGMENT; GRANTING IN PART AND DENYING IN PART THE PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION; AND DENYING THE DEFENDANTS' MOTION FOR A STAY OF THE INJUNCTION

INTRODUCTION

The plaintiffs are three Indian tribes, who operate gaming centers on their Reservations. The plaintiffs brought this action against the County of San Diego, Sheriff Jim Roache, Deputy Dan Papp, and District Attorney Edwin Miller. In this motion, the plaintiffs seek summary judgment, declaratory relief, and a permanent injunction The court grants the plaintiffs' notion for declaratory relief, and grants in part and denies in part their motion for injunctive relief. The court concludes the defendants lacked jurisdiction under 18 U.S.C. § 1162 and under the Indian Gaming

Regulatory Act to execute the October 1991 warrants and to criminally prosecute four individuals associated with the gaming centers. The defendants ask this court to stay the proceedings and argue the court is without jurisdiction to adjudicate the merits of the action or to issue injunctive relief. The court concludes it does have jurisdiction to proceed with the merits and to grant the appropriate relief, and, in the exercise of its discretion, chooses not to stay the action.

FACTS

This case arises out of the execution of search warrants, issued by a San Diego municipal court, on the Sycuan, Barona, and Viejas Indian Reservations. On October 30, 1991, San Diego County sheriff's deputies searched the Sycuan, Barona, and Viejas gaming centers, located on the respective Reservations, and seized numerous gaming devices, cash, and records. The gaming devices seized included numerous Autotab Model 101 electronic pull-tab dispensers. The District Attorney's Office subsequently commenced criminal prosecutions against individuals involved in the gaming centers for possession of a slot machine, in violation of California Penal Code § 330 These individuals are James Trant, Emmett Munley, Helen Chase, and Anthony Pico.

All three Bands are federally recognized Indian Tribes, with a governing body duly recognized by the Secretary of the Interior, and are located in San Diego County. Prior to the commencement of gaming operations on the Reservations, each Band was suffering severe economic depression. Specifically, the Bands faced high unemployment and were unable to provide basic governmental services to Tribal members and other Reservation residents. The revenue received from the gaming centers has been used to provide various governmental services and numerous other services,

such as scholarships, nutritional programs, and housing rehabilitation.

This court has issued a temporary restraining order and a preliminary injunction against the defendants. The preliminary injunction prohibits the defendants from arresting persons for alleged violations of state gaming laws on the Sycuan, Barona, or Viejas Reservations; searching for or seizing gaming-related property allegedly in violation of state gaming laws used in connection with the operation of the gaming centers, unless the warrant complies with Federal Rule of Criminal Procedure 41(a) or is pursuant to cross-designation; implementing or continuing with criminal prosecutions against persons associated with the gaming centers for alleged violations of state gaming laws; and destroying or removing any of the seized property without prior court approval. The defendants have appealed the issuance of the preliminary injunction.

The plaintiffs now seek a partial summary judgment, including a permanent injunction and declaratory relief. Specifically, the plaintiffs seek a declaratory judgment that the defendants are without jurisdiction to enforce the state gaming laws on the Reservations, in the absence of a tribal-state compact, and seek a permanent injunction mirroring the preliminary injunction. The defendants raise several arguments in opposition to the plaintiffs' motion and contest the court's jurisdiction to adjudicate the merits of the action and to issue an injunction.

DISCUSSION

I. STANDARDS FOR A SUMMARY JUDGMENT MOTION

To succeed on a motion for summary judgment, the movant must first demonstrate "there is no genuine issue as to any material fact and the moving party is

> entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56(c). Material facts are those which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986). A genuine dispute will exist if the facts indicate "a reasonable jury could return a verdict for the nonmoving party." *Id.*

Concerning this motion, the facts are not in dispute. The parties do not dispute the circumstances surrounding the execution of the warrants or the attempts to criminally prosecute the four individuals involved with the gaming centers. Accordingly, the court will proceed to a discussion of the applicable law.

II. DECLARATORY RELIEF

The plaintiffs first seek a declaratory judgment that the defendants are without authority to enforce state gaming laws on the Sycuan, Barona, or Viejas Indian Reservations. After thoroughly reviewing the case law, statutory language, principles of statutory construction, and the legislative history relevant to this case, this court concludes the plaintiffs are entitled to declaratory relief. The court notes, however, that its holding is limited to a conclusion that the defendants were without authority to execute the October 1991 warrants or to criminally prosecute James Trant, Helen Chase, Emmett Munley, and Anthony Pico. The court is not speculating as to future circumstances or as to whether the defendants would be without authority to enforce its gaming laws under any set or circumstances.

In its opposition to summary judgment, the defendants contend they did have jurisdiction to undertake the challenged activities and raise many of the same arguments rejected by this court in the order granting preliminary injunctive relief. The defendants' arguments are discussed in turn.

A. JURISDICTION UNDER 18 U.S.C. § 1162 (PUBLIC LAW 280)

The defendants argue they had authority to execute the warrants at issue and to prosecute the four individuals pursuant to 18 U.S.C. § 1162. Under section 1162, Congress granted six states, including California, jurisdiction over offenses committed on Indian lands. Under this section, the state has jurisdiction over criminal/prohibitory laws, but does not have jurisdiction over civil/regulatory laws. *California v. Cabazon Band of Missiop Indians*, 480 U.S. 208 (1987). The extent of the state's jurisdiction to enforce criminal/prohibitory laws is the same as that which it could exercise elsewhere in the state.

> A state law will be deemed "criminal/prohibitory" and, thus, enforceable by a state on Indian land, if the state has indicated that the conduct at issue is against the state's public policy. *Id.* at 209. That a particular law is enforceable through criminal means does not necessarily indicate that the law is criminal/prohibitory. N. at 211. To characterize the law at issue, the court must examine the nature of the activity and the overall legal context governing the activity. *See Confederated Tribes v. State of Washington*, 938 F.2d 146 (9th Cir. 1990).

The defendants argue the analysis required to make this determination should focus on the particular laws prohibiting slot machines and not on California's gambling laws as a whole. The defendants' contention is without merit. The Ninth Circuit has held that, in order to protect Indian sovereignty from state interference, a court should resolve any doubts concerning the characterization of a law in favor of the Indians. *Confederated Tribes v. State of Washington*, 938 F.2d 146, 149 (9th Cir. 1991). Thus, any doubts concerning the characterization of California's gambling laws in general or its laws relating to slot machines in

particular should be resolved in favor of finding the laws to be civil/regulatory.

In *Cabazon*, the Supreme Court analyzed California's bingo laws and concluded the laws were civil/regulatory, rather than criminal prohibitory. In determining the characterization of the bingo laws, the Supreme Court analyzed California's gaming laws as a whole and did not merely focus on the limitations to the game of bingo within the state. The Court began its analysis by noting that "California does not prohibit all forms of gambling,1, and proceeded to list certain forms of gambling allowed. *Id.* at 210. Although the Court acknowledged that the state prohibited certain forms of gambling, the Court noted that California allows numerous forms of gambling, including "encouraging its citizens to participate in state-run gambling" by operating a state lottery, and permitting parimutuel horse-race betting. Based on the state's allowance of a "substantial amount of gambling activity," the Court concluded that "California regulates rather than prohibits *gambling in general and bingo in particular." Id.* at 211.

> A recent Ninth Circuit decision also employed a broader analysis and did not focus solely on the laws prohibiting a certain activity. *Confederated Tribes v. State of Washington*, 938 F.2d 146 (9th Cir. 1990). In *Confederated*, a tribal member was cited for speeding on the Indian reservation. The state argued it had jurisdiction to enforce its speeding laws on the reservation pursuant to section 1162. Specifically, the state argued its speeding laws were criminal/prohibitory because the state prohibits speeding in all circumstances and makes no exceptions to this prohibition. The Ninth Circuit concluded the state's analysis was erroneous. The appropriate inquiry is whether the "prohibited activity is a small subset of a larger permitted activity or whether all but a small subset of a basic activity is

prohibited." *Id.* at 149. The court held the state's speeding laws were civil/regulatory because, while speeding is prohibited, driving is generally permitted within the state. Therefore, the speeding laws, a subset of the state's more general driving laws, were civil/regulatory and unenforceable under section 1162.

Although California prohibits the operation of slot machines in most instances, California permits a great deal of other gaming within the state. California not only allows this activity, but actively encourages certain forms of gaming. For example, the state sponsors and promotes a state lottery. Because California permits a substantial amount of gaming and actively encourages and benefits from the gaming, this court concludes the slot machine prohibition is a civil/regulatory law.

The defendants present several cases which they contend indicate that this court should adopt a narrower analysis. These cases are distinguishable. First, *United States v. Marcyes,* 557 F.2d 1361, 1362 (9th Cir. 1977), involved a state's complete prohibition of the possession of fireworks. The laws prohibiting fireworks were not a subset of a larger, permitted activity. The state did not permit some types of fireworks and absolutely prohibit others. Rather, the state completely prohibited the private possession of fireworks. Thus, consistent with the Court's broader analysis in *Cabazon,* the firework laws were held to be criminal/prohibitory. Second, in *Pueblo of Santa Ana v. Hodel,* 663 F. Supp. 1300 (D.D.C. 1987), the court characterized New Mexico's laws prohibiting greyhound racing as criminal/prohibitory. Contrary, however, to California's gambling laws, New Mexico prohibits almost all forms of gambling. Therefore, New Mexico's gambling laws in general may be classified as criminal/prohibitory. In sum, California's laws governing slot machines are characterized as civil/regulatory. Accordingly, the defendants lacked author-

ity under section 1162 to enforce California's gaming laws on the Reservations by executing the October 1991 warrants and by criminally prosecuting the four individuals.

B. JURISDICTION UNDER THE IGRA

Even if section 1162 granted the defendants jurisdiction to perform the challenged activities, the Indian Gaming Regulatory Act ("IGRA") preempted the defendants' jurisdiction under section 1162. The court further concludes the defendants did not have the authority to enforce its gaming laws in the present case under the IGRA because a tribal-state compact did not permit the defendants to enforce its slot machine laws on the Sycuan, Barona, and Viejas Reservations. Thus, the court does not rely solely on its interpretation of *Cabazon* to conclude the defendants lacked authority to execute the October 1991 warrants and to criminally prosecute the four individuals.

As an initial matter, the defendants contend the more stringent standard of repeal by implication applies, rather than preemption. The court need not resolve this argument because, even under the more stringent standard, the court concludes the IGRA precludes the defendants from enforcing its gaming laws pursuant to section 1162. A federal statute will not repeal a prior federal statute unless no reasonable construction can give effect to both statutes. *United States v. Jones,* 607 F.2d 269, 272 (9th Cir. 1979). Section 1162 can be read as compatible with the IGRA. Under section 1162, California retains the ability to enforce its criminal/prohibitory laws. The IGRA simply governs the enforcement of state gaming laws and prohibits the enforcement of these laws in the absence of a tribal-state compact.

In determining whether the IGRA preempts state authority under section 1162, the court does not employ the typical preemption analysis. Because of the "firm federal policy of promoting tribal self-sufficiency and economic develop-

ment," a finding of preemption does not require an express statement of congressional intent to preempt. *Crow Tribe of Indians v. State of Montana,* 819 F.2d 895, 898 (9th Cir. 1987). A federal statute will be preemptive if the "state law conflicts with the purpose or operation of a federal statute." *Id.* As discussed below, the IGRA creates a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands. The regulation of gaming by states outside the framework of the IGRA would frustrate this framework and Congress's careful balancing of the competing interests involved in Indian gaming.

(1) CRIMINAL PROSECUTIONS

In the IGRA, Congress addressed the state's authority to criminally prosecute individuals for alleged violations of its gaming laws made applicable to Indian lands under the IGRA. Section 1166(d) provides:

> The United States shall have *exclusive jurisdiction* over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact . . . has consented to the transfer to the state of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Despite this language, the defendants argue the state retains the authority to criminally prosecute individuals for violations of the state's gaming laws pursuant to section 1162.

Even assuming that California has the authority to enforce its gaming laws under section 1162 consistent with *Cabazon*, the defendant's argument that it has jurisdiction notwithstanding section 1166(d) is without merit. The defendant's argument ignores the plain language of the statute and principles of statutory construction.

It is a well-established rule of construction that a more specific statutory section governing jurisdiction controls over a more general statutory section. *California v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989). "The rule that a precisely drawn, detailed statute preempts more general remedies flows from the Congressional intent to carve out from the broader scheme a specific exception for this particular type of claim." *Id.* The defendant suggests that sections 1162 and 1166(d) can be harmonized by concluding that both state and federal authorities may prosecute violations of criminal/prohibitory laws under sections 1162 and 1166(d), but section 1166(d) limits the prosecution of civil/regulatory laws to the federal government. This construction would render superfluous Congress's express words and its comprehensive statutory scheme governing Indian gaming. A more appropriate and common-sense harmonization of the two statutory sections is simply that the state retains criminal jurisdiction under section 1162 to prosecute violations of all criminal/prohibitory laws other than those relating to gambling. Thus, pursuant to section 1162, the state has the authority to criminally prosecute homicides, drug offenses, and a variety of other criminal offenses. However, only the United States has jurisdiction to prosecute violations of the state's gambling laws on Indian lands.

The defendant's argument also ignores other well-established principles of statutory construction. First, the starting point of analysis is not the assumption that the state has jurisdiction but rather that the state is without jurisdiction over the reservation. *Confederated Tribes*, 938 F.2d at 149; *Barona Group v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982). Historically, state jurisdiction over reservations has been strongly disfavored in order to protect Indian sovereignty from state interference. Second, any ambiguities in the statutory sections should be resolved in favor of the Indians and, thus, against the authority of the state to exercise jurisdiction. *Barona Group*, 694 F.2d at 1190.

Third, this court is obligated to give ordinary meaning to the words chosen by Congress. *Yeutter*, 887 F.2d at 911. The court must assume that when Congress chose to use the words "exclusive jurisdiction," Congress meant exactly that. Therefore, Congress did not intend to confer concurrent state jurisdiction by stating that the United States has "exclusive jurisdiction" over criminal prosecutions of offenses under the IGRA. The defendants, therefore, are without jurisdiction to criminally prosecute James Trant, Emmett Munley, Helen Chase, and Anthony Pico.

(2) EXECUTION OF WARRANTS

The defendants next argue that, even if they are without jurisdiction to criminally prosecute the four individuals, they retain the authority to engage in preliminary law enforcement activities, such as searching for and seizing illegal devices under state law. To determine the extent to which the defendants can exercise jurisdiction beyond criminal prosecutions, the court will examine the statutory framework of the IGRA, the case law addressing the IGRA, and the legislative history of the IGRA.

In October 1988, Congress enacted the IGRA for the purpose of providing a statutory basis for Indian tribes to engage in gaming as a means of promoting tribal economic development, self sufficiency, and strong tribal governments; to provide a statutory basis for tribal regulation of gaming adequate to shield it from organized crime and other corrupting influences; to ensure the tribe is the primary beneficiary of the gaming; and to assure gaming is conducted fairly and honestly by both the operators and the players. The statute establishes an independent federal regulatory authority and federal standards to govern gaming on Indian lands. The statute declares this is necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. §§ 2701-2721.

Under the IGRA, gaming is categorized as either class I, class II or class III. Class I gaming consists of social games for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of or in connection with tribal ceremonies or celebrations. Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes. Class II gaming consists of bingo, pull-tabs, lotto, punch boards, tip jars, and certain card games permitted under state law. Class II gaming continues to be within the jurisdiction of the Indian tribes, but is subject to the provisions of the IGRA. Class III gaming consists of all other forms of gaming. Class III gaming activities are lawful on Indian lands only if such activities are authorized by a tribal ordinance, are located in a state that permits such gaming, and are conducted in conformance with a tribal-state compact.

With respect to class III gaming, Congress federalized state law. Section 1166 (a) of the IGRA provides:

> [F]or purposes of federal law, all state laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the state.

Thus, the content of federal law under the IGRA for the regulation of class III gaming is defined by state law. The incorporation of state law, however, does not necessarily indicate that Congress intended to grant concurrent jurisdiction to the states to enforce the new federal rights. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 389 (1938); *De Sylva v. Ballentine*, 351 U.S. 570 (1956). Rather, by federalizing state law, Congress chose to incorporate existing law rather than create a uniform body of law governing each of the states.

The federalization of state law appears to have been an important part of the compromise given to the states by Congress when balancing the interests implicated by Indian gaming. In the legislative history, Congress first notes that Congress, and not the courts as in *Cabazon*, should strike the appropriate balance to determine the extent to which the states can enforce their gaming laws on reservations. S.Rep. No. 466, 100th Cong., 2d Sess. 3, *reprinted in*, U.S. Code Cong. & Admin. News at 3073. In striking this balance, Congress acknowledged the interest of the states to enforce their gaming laws on reservations and, particularly, to prohibit gaming that would be illegal if performed elsewhere in the state. Congress also was aware of the concern of the states and the Department of Justice ("DOJ") over the potential for the infiltration of organized crime and other criminal elements. The DOJ argued the states had the expertise and the experience to regulate and enforce its gaming laws on the reservations. Congress, however, also acknowledged the tribes' strong aversion to any extension of state jurisdiction onto the reservations. With regard to the tribes' interests, Congress acknowledged the

> well-established principles of Federal-Indian law ... that unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands [and] that even when Congress has enacted laws to allow a limited application of state law on Indian lands, the Congress has required the consent of tribal governments before state jurisdiction can be extended to tribal lands.

Id. at 3075. In striking a balance between the interests of the states and the tribes, Congress sought to preserve these principles. *Id.*

Congress balanced these competing interests and developed a jurisdictional framework for the regulation of gaming activities on Indian land. The cases addressing the IGRA

have concluded the IGRA provides for state jurisdiction only when the state enters into a compact with the tribe. The Tenth Circuit has concluded that "the very structure of the IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming." *Keetoowah Indians v. State of Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991). In the absence of a compact, the IGRA leaves "no other direct role for such state gaming enforcement." *Id.* The only other published case addressing the IGRA is in accord. *See Lac du Flambeau Band v. Wisconsin*, 743 F.Supp. 645, 646 (W.D. Wis. 1990).

The legislative history also supports the proposition that a state may exercise jurisdiction over Indian gaming only by entering into a compact with the tribe. The legislative history provides:

> [U]nless a tribe affirmatively elects to have state laws and state jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow state jurisdiction on Indian lands for the regulation of Indian gaming activities.
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of state jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-state compact. In no instance, does S. 555 contemplate the extension of state jurisdiction or the application of state laws for any other purpose.

U.S. Code Cong. & Admin. News at 3075-76.

The balance struck by Congress under the IGRA appears to be that the state laws governing gaming apply, for the most part, with the same force and effect the laws would have elsewhere in the state. Thus, by federalizing state law, the states could generally define the boundary between legal

and illegal gaming, and could be assured that activities that would be illegal if performed outside the reservation boundaries would also be illegal within the reservation boundaries. The definition of legal versus illegal gaming, however, is the limit of state authority over Indian gaming in the absence of a compact. Under the IGRA, the tribes can be assured that the states will not have jurisdiction over the reservations to enforce their gaming laws unless the tribe chooses to allow state jurisdiction by negotiating a tribal-state compact. Because the defendants did not enter into a compact with the plaintiffs to permit the defendants to exercise jurisdiction over their gaming, the defendants were without authority to execute the October 1991 warrants on the Sycuan, Barona, and Viejas Reservations.

The defendants, however, present two arguments in support of their contention that the IGRA allows the state to engage in preliminary law enforcement activities. The defendants' arguments are without merit.

(a) Statutory Interpretation

First, the defendants contend that the term "criminal prosecution" should be narrowly interpreted by the court to exclude state jurisdiction only over that phase of a state's criminal jurisdiction. The defendants' argument is contrary to well-established principles of construction. Any ambiguities in the IGRA should be resolved in favor of the Indians and, thus, against the authority of the state to exercise any jurisdiction. *Barona Group*, 694 F.2d at 1190. The historical federal concern over Indian sovereignty requires this court to resolve any doubts against the exercise of state jurisdiction. *Confederated Tribes*, 938 F.2d at 149.

(b) Law Governing Search Warrants

The defendants next argue the warrant was valid as a state warrant and, thus, the evidence seized would be admissible in a subsequent federal prosecution. The warrant clearly was

not valid under Federal Rule of Criminal Procedure 41(a). This Rule allows a state court to issue a warrant for an alleged violation of federal law. However, the warrant may only be issued upon the request of a federal law enforcement officer or attorney. *United States v. Radlick*, 581 F.2d 225, 228 (9th Cir. 1978). The October 1991 search warrants were not issued at the request of any federal officer or attorney and, therefore, the search warrants were not valid federal search warrants.

The October 1991 warrants also were not valid as state warrants. A state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation. *See* Clinton, *Criminal Jurisdiction over Indian Lands*, 18 Ariz. L. Rev. 503, 572-74 (1976). This rule is consistent with the strong federal policy of minimizing state interference in tribal life. *Id.* The precise issue presented by the defendants' argument is whether the state 'nay issue and execute a warrant, not complying with Rule 41(a), to search for and seize evidence if the state is without authority to prosecute because of exclusive federal jurisdiction.

The Tenth Circuit has addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), state authorities executed a state search warrant on a reservation. The evidence seized was later turned over to federal authorities for use in a federal prosecution. The Tenth Circuit concluded the evidence should have been suppressed because the search warrant was invalid. The search warrant was not valid as a federal warrant because not obtained pursuant to Rule 41(a). The search warrant also was not valid as a state warrant because the state had no jurisdiction over the reservation to enforce its laws, including the execution of a search warrant, unless Congress consented to the state's jurisdiction.

A second case, *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990), involved an arrest on Indian lands. The Tenth Circuit held the arrest was illegal because, again, the state was without jurisdiction to enforce its laws on the Indian lands.

Further, under general principles of search and seizure, "when a judicial authority . . . issues a search warrant, . . . it is presumed that the alleged offense . . . is within the limits of the issuing authority." Varon, Searches, Seizures and Immunities 408 (2d 1974).

> The majority view is that jurisdiction is necessary to the protection of the constitutional rights of the individual. The decisions uniformly hold that an issuing authority can only take cognizance of offenses that are within the purview of his authority . . . The lack of jurisdiction by the issuing authority to issue a search warrant is not to be considered as a mere technicality

Id. at 409. As a general principle, a judicial officer's writ cannot run outside the officer's jurisdiction. *See United States v. Strother*, 578 F.2d 397 (D.C. Cir. 1978). Thus, the October 1991 warrants were invalid because the state court did not have the authority to issue the warrants.

California law also indicates the defendants acted beyond their authority by executing the October 1991 warrants on the Sycuan, Barona, and Viejas Reservations. California Penal Code §830.1 defines the territorial limitations of peace officers, including sheriffs and their deputies, in enforcing the law. The peace officers's authority extends to "any public offense . . . within the political subdivision which employs" the sheriff. If the sheriff acts outside this territorial jurisdiction, the sheriff has no law enforcement powers other than those that any private citizen would have. *People v. Pina*, 72 Cal.App.3d Supp. 35, 39 (1977). The reservations at issue certainly were not within the political subdivision which employed the sheriff or his deputies. The defendants,

therefore, acted beyond their authority by executing the October 1991 search warrants.

III. PERMANENT INJUNCTION

The plaintiffs next seek a permanent injunction prohibiting the defendants from arresting persons for the alleged violations of state gaming laws on the Sycuan, Barona, or Viejas Reservations; searching for or seizing gaming-related property allegedly in violation of state gaming laws used in connection with the operation of the gaming centers, unless the warrant complies with Federal Rule of Criminal Procedure 41(a) or is pursuant to cross-designation; implementing or continuing with criminal prosecutions against persons associated with the gaming centers for alleged violations of state gaming laws; and destroying or removing any of the seized property without prior court approval.

To determine whether to issue a permanent injunction, the court, of course, must conclude that the plaintiff prevails on the merits. *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). The court, however, must consider additional factors. First, the plaintiffs must establish that they face the likelihood of substantial and immediate irreparable injury in the absence of a permanent injunction, and that the remedies at law are inadequate to protect their interests. *Id.* The court may also balance the equities involved in the particular case. *Id.*

As discussed above, the court concludes the plaintiffs prevail on the merits with regard to the defendants' lack of jurisdiction to execute the October 1991 warrants or to criminally prosecute the four individuals. After balancing the equities and examining the risk of injury the plaintiffs face in the absence of a permanent injunction, the court grants in part and denies in part the plaintiffs' request for a permanent injunction.

With respect to the pending criminal prosecutions, the defendants are without jurisdiction to continue the prosecutions. Section 1166(d) of the IGRA clearly states that the United States has "exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country . . . ." The court believes it would be unnecessary to expend the amount of time and resources necessary to prosecute the four individuals when any judgment would lack force due to a lack of jurisdiction. Further, the four individuals should not continue to be threatened with the many adverse consequences of a pending criminal prosecution. Therefore, this court permanently enjoins the pending criminal prosecutions of James Trant, Emmett Munley, Helen Chase, and Anthony Pico.

The court, however, declines to permanently enjoin the defendants from arresting individuals or searching for and seizing evidence in the future for alleged violations of its gaming laws. The plaintiffs have not presented facts indicating that the defendants intend to enter their Reservations in the future to enforce the gaming laws or to arrest other persons associated with the gaming centers for alleged violations of state gaming laws. That the defendants may again attempt to enforce the gaming laws is merely speculation. The equitable remedy of a permanent injunction is the plaintiffs fail to establish a "real or immediate threat" that the plaintiff will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Further, a permanent injunction could greatly affect the ability of state law enforcement officials to carry out their duties. The court will not speculate as to all future circumstances and tie the hands of law enforcement officials from upholding the law under any and all factual circumstances. Accordingly, the plaintiffs' request for a permanent injunction prohibiting the defendants from engaging in prelimi-

nary law enforcement activities in order to enforce the state gaming laws is denied.

The court notes, however, that it has continuing jurisdiction over the action. If the defendants do take further action to enforce the gaming laws during the pendency of this action, the plaintiffs may obtain an expedited hearing for a temporary restraining order. In addition, further actions by the defendants to enforce the gaming laws may adversely impact a good faith defense in the pending or future actions under 42 U.S.C. § 1983.

IV. JURISDICTION

Finally, the defendants argue this court lacks jurisdiction to resolve the merits of the case and to issue any injunctive relief. The defendants' arguments are without merit.

A. ANTI-INJUNCTION ACT

The defendants contend for the first time in this case that the Anti-Injunction Act prohibits this court from enjoining the pending criminal prosecutions against James Trant, Emmett Munley, Helen Chase, and Anthony Pico. Although the Anti-Injunction Act applies to the injunction issued by this court restraining the District Attorney, the injunction falls within one, if not two, exceptions to section 2283. The court, however, is aware of the importance of the Anti-Injunction Act and the great deference owed the state courts. Nevertheless, the court feels its injunction clearly falls within the exceptions based on Ninth Circuit precedent, the language of section 1166(d), and the need to recognize the tribes as sovereigns. The injunction, therefore, properly restrains the state court from proceeding with the criminal trials against the four individuals.

The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings unless the injunction falls within three exceptions. 28 U.S.C. § 2283. Section 2283

does not affect the jurisdiction of a federal court, but rather is a rule of comity designed to promote harmony between federal and state courts. *Parsons Steel V. First Alabama Bank*, 106 S.Ct. 768, 773 (1986). A federal court may restrain state court proceedings only if an injunction is (1) "expressly authorized by Congress," (2) "necessary in aid of its jurisdiction," or (3) necessary "to protect or effectuate its judgments." *Id.; see also White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1304 (9th Cir. 1988). These exceptions are to be narrowly and strictly construed. *Amalgamated Clothing Workers v. Richman Brothers*, 75 S.Ct. 452, 455 (1955).

Section 2283 applies to this action. The injunction expressly restrains the District Attorney, but does not expressly restrain the state court itself. Nevertheless, the prohibition of section 2283 applies when the injunction is directed at a party to a state court proceeding. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 90 S.Ct. 1739, 1743 (1970). In other words, the prohibition of section 2283 may not be avoided by framing an injunction as a restraint against a party rather than as a restraint directly against the state court. *Id.*

The injunction issued by this court falls within the "necessary in aid of its jurisdiction" exception. The Ninth Circuit has concluded an injunction issued against a state court proceeding fell within this exception in order to protect tribal sovereignty. *White Mountain*, 856 F.2d at 1304-05.

In *White Mountain*, the Indian Tribe undertook to build four housing projects and entered into a contract with Aetna, requiring Aetna to provide performance bonds for each project. As part of the contract, Aetna required the Tribe to indemnify Aetna in the event the Tribe, as general contractor, failed to pay all labor and supply costs involved in the projects. A subcontractor subsequently brought suit

against Aetna in state court to recover for unpaid plumbing supplies.

The district court enjoined the state proceedings. The Tribe argued that, because of its contract with Aetna, an action against Aetna in state court would necessarily hale the Tribe into state court to adjudicate matters exclusively within the jurisdiction of the tribal court. The Tribe argued such a result impermissibly infringed upon the Tribe's federally protected right of self-government and violated federal Indian policy of immunity from suit in state court.

The Ninth Circuit concluded the injunction did not violate the Anti-Injunction Act, because the injunction fell within the "necessary in aid of its jurisdiction" exception. The Ninth Circuit reasoned the district court had the authority to issue the injunction to "preserve the integrity of tribal claims." *Id.*

This conclusion acknowledges the well-established principle of Federal-Indian law that, unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands.

Similarly, pursuant to 18 U.S.C. § 1166(d), Congress has granted exclusive federal jurisdiction over criminal prosecutions involving violations of state gaming laws made applicable to Indian Reservations pursuant to the IGRA. To preserve primary federal jurisdiction over Indian law and, specifically Indian gaming law, it is necessary for this court to enjoin the pending criminal prosecutions.

The injunction also satisfies the test enunciated by the Supreme Court to determine whether an injunction falls within the "authorized by an Act of Congress" exception. *Mitchum v. Foster*, 92 S.Ct. 2151 (1972). Under the *Mitchum* test, the act of Congress must (1) "have created a specific and uniquely federal right or remedy, enforceable in a federal court," and (2) can "be given its intended scope

only by stay of the state court proceeding." *Id.* at 2159. The Supreme Court subsequently narrowed the *Mitchum* test in *Vendo Co. v. Lektro-Vend. Corn.*, 97 S.Ct. 2881 (1977). To fall within the exception, the act of Congress also must "necessarily interact with or focus upon a state judicial process." *Id.* at 2892.

The act of Congress authorizing this injunction is the IGRA. This Act created a unique and comprehensive scheme of regulating and enforcing gaming on Indian lands. A primary purpose of the IGRA was to create a jurisdictional framework for the regulation of gaming activities on Indian land and, specifically, to delineate the boundaries of state authority over this area. In the IGRA, Congress specified the areas over which the states could exercise authority over Indian gaming. Included within this scheme, Congress provided exclusive federal jurisdiction over criminal prosecutions. To allow a state to ignore this jurisdictional framework by exercising jurisdiction over an area governed by exclusive federal jurisdiction, would clearly frustrate the purposes of the IGRA. Therefore, the injunction also falls within this exception.

B. JURISDICTION OF DISTRICT COURT PENDING APPEAL

The defendants next contend this court lacks jurisdiction to continue with the merits of the action because the defendants have appealed the issuance of the preliminary injunction. The court rejects the defendants' argument.

The general and well-established rule is that, upon the filing of a timely notice of appeal, jurisdiction is immediately transferred from the district court to the appellate court. *See. e.g., Hovey v. McDonald*, 109 U.S. 150 (1883). During the pendency of the appeal, the district court retains only the limited jurisdiction to assist the appellate court in its resolution of the appeal. *United States v. Lafko* 520 F.2d

622, 627 (3d Cir. 1975). The rule derives from the desire to avoid the confusion and inefficiency that might result from two different courts deciding the same issue at the same time. *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983). To promote efficiency, the Ninth Circuit construes this rule as one of judicial prudence, rather than an absolute rule. *Id.*

A well-recognized exception to this general rule of divestiture of jurisdiction is appeals from orders granting or denying jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). In an early case, the Ninth Circuit concluded an appeal from an interlocutory order does not divest the district court of jurisdiction to continue with other phases of the trial. *Phelan v. Taitano*, 233 F.2d 117 (9th Cir. 1956). Numerous other courts also have concluded an appeal of a preliminary injunction does not prevent the district court from proceeding with the action on the merits. *Shevlin v. Schewe*, 809 F.2d 477 (7th Cir. 1987); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976); *Thomas v. Board of Educ.*, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979); *Watkins v. United States Army*, 541 F.2d 249, 252 (W.D. Wa. 1982); *Robb Container Corn. v. Sho-Me Co.*, 566 F.Supp. 1143, 1157 (N.D. Ill. 1983); *United Parcel Svc. v. United States Postal Serv.*, 475 F.Supp. 1158 (E.D. Pa. 1979); *see also* 9 Moore's Federal Practice ¶ 203.11, at 3-54. The reasoning for this exception is delay and inefficiency would result if proceedings in the district court were stayed. *City of Chicago*, 534 F.2d at 711. The court, therefore, does have jurisdiction to proceed with the merits of the case.

The defendants also ask this court to stay the preliminary injunction. The court has jurisdiction to modify or stay the preliminary injunction pending the appeal. Federal Rule of Civil Procedure 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction,

> the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal . . . Federal Rule of Appellate Procedure 8(a) further provides the district court with the authority to stay the injunction pending an appeal. . . . Federal Rule of Appellate Procedure 8 (a) further provides the district court with the authority to stay the injunction pending an appeal.

The defendants have failed to present this court with sufficient reasons for staying the preliminary injunction. The plaintiffs have presented evidence that a delay in the resolution of the merits would cause severe economic hardships. The defendants have not pleaded facts indicating they would suffer similar hardships. The defendants are not prohibited from enforcing their gaming laws. Rather, the defendants are simply required to comply with the law by obtaining cross-designation or approval from federal officers pursuant to Rule 41(a). A stay of the injunction also would not ultimately advance the progress of this litigation. Therefore, the defendants' request is denied.

C. RES JUDICATA

The defendants contend res judicata precludes the Barona plaintiffs from seeking relief from this court. The defendants contend a prior suit brought by the Barona Tribal Bingo against the County of San Diego bars the present action. In 1989, the Barona Tribal Bingo brought suit against the County, alleging the County was without jurisdiction to enforce state gaming laws on the Barona Reservation. The district court agreed and granted summary judgment for the County.

Res judicata precludes parties and their privies from relitigating issues that were or could have been raised in a prior action. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981).The doctrine of res judicata extends only to

facts and conditions existing at the time of the prior judgment. *Clark v. Yosemite Community College*, 785 F.2d 781, 789 (9th Cir. 1986). Res judicata does not bar a subsequent action based on facts or conduct occurring since the time of the prior judgment. *Id.*

The Barona plaintiffs' current action is not barred by res judicata, because this action involves an entirely different set of circumstances. The prior case involved the execution of search warrants in 1989. The present case involves a subsequent and unrelated search and seizure. Further, the defendants have not presented any facts indicating that the Barona plaintiffs are the same party that litigated the prior action or were privies to that party. The only plaintiff in the prior action was Bingo Enterprises, Incorporated. The plaintiff in this action is the Barona Band of Mission Indians. Therefore, res judicata does not bar the present action.

D. *YOUNGER* ABSTENTION

Finally, the defendants argue the *Younger* abstention doctrine requires this court to abstain in order to allow the criminal prosecutions to continue. The *Younger* doctrine does not require this court to abstain from determining the merits of the action.

In applying the *Younger* doctrine, federal courts must examine (1) the nature of the state proceedings to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal relief to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings. *Partington v. Gedan*, 880 F.2d 116, 121 (9th Cir. 1989). The *Younger* doctrine, however, applies only to actions brought by the individuals being prosecuted in a state court. *Doran v. Salem Inn. Inc.*, 422 U.S. 922, 928 (1975). In other words, a "state defendant's inability to bring a federal action because

of a pending state prosecution does not affect other potential federal plaintiffs who are not themselves the subject of pending prosecution." *Ripplinger v. Collins*, 868 F.2d 1043, 1049 (9th Cir. 1989).

This court is aware of the vital interests served by the *Younger* doctrine and the proper respect and deference owed the state court. The court also acknowledges the strong interest of the state to enforce its gaming laws and to prevent the infiltration of organized crime and other criminal elements into gaming permitted within the state's geographical boundaries. Nevertheless, this case is unique because Congress has clearly stated that the state courts are without jurisdiction to criminally prosecute individuals for alleged violations of gaming laws made applicable under the IGRA. 18 U.S.C. § 1166(d). Further, the plaintiffs in this case are not the individuals the state wishes to prosecute. Accordingly, the defendants' request for abstention is denied.

DATED: February 24, 1992

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,
vs.
JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego, and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

BARONA BAND OF MISSION INDIANS, a/k/a BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, and VIEJAS BAND OF MISSION INDIANS, a/k/a VIEJAS GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,
Plaintiffs,
vs.
JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

ORDER GRANTING THE PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT, GRANTING IN PART AND DENYING IN PART THE PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION, AND DENYING THE DEFENDANTS' MOTION FOR A STAY OF THE INJUNCTION

CASE NO. 91-1669 H (BTM)

Plaintiffs' motion for declaratory judgment and motion for permenent [sic] injunction, and defendants' notion for a stay of the injunction came on regularly for hearing February 24, 1992, at 10:30 a.m. before this court, the Honorable Marilyn L. Huff presiding. Attorney George Forman appeared for plaintiff Sycuan Band of Mission Indians, attorney Art Bunce appeared for plaintiffs Barona Band of Mission Indians and Viejas Band of Mission Indians and attorney Mark Beesley appeared for the defendants. .

After carefully considering the papers and argument of the moving party and opposing counsel, as well as the record on file and the applicable law, the court's findings of fact and conclusions of law are set forth in the Memorandum Decision Granting the Plaintiffs' Motion for a Declaratory Judgment, Granting in Part and Denying in Part the Plaintiffs' Motion for a Permanent Injunction, and Denying the Defendants' Motion for a Stay of the Injunction, and are hereby incorporated into this order.

IT IS ORDERED that the plaintiffs' motion for declaratory relief on their first claim for relief in their first amended complaint is granted. Specifically, as more fully explained in the court's Memorandum Decision, the defendants were without jurisdiction under the Indian Gaming Regulatory Act to execute the October 1991 warrants or to criminally prosecute James Trant, Emmett Munley, Helen Chase, or Anthony Pico, for possession of a slot machine, in violation of California Penal Code § 330.1, arising out of the execution of the October 1991 warrants.

IT IS FURTHER ORDERED that the defendants, their officers, agents, employees, and all those in active concert or participation with the defendants are permanently enjoined from proceeding with the pending criminal prosecutions of James Trant, Emmett Munley, Helen Chase, and Anthony

Pico. In addition, the defendants are restrained and enjoined from destroying, mishandling, altering, or removing without prior court approval any gaming-related property previously seized by defendants from the Sycuan Indian Reservation, the Barona Indian Reservation, or the Viejas Indian Reservation, located on Indian lands in San Diego County.

IT IS FURTHER ORDERED that the plaintiffs' motion for a permanent injunction restraining the defendants from arresting individuals, or searching for and seizing evidence allegedly in violation of the Indian Gaming Regulatory Act is denied without prejudice; and the defendants motion for a stay of the permanent injunction is denied.

DATED: 2/27/92

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,
v.
JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

ORDER DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE PLAINTIFF'S MOTION TO AMEND THE FIRST AMENDED COMPLAINT

This case came on for hearing on March 30, 1992, at 10:30 a.m., before the Honorable Marilyn L. Huff. George Forman appeared on behalf of plaintiff Sycuan Band of Mission Indians, and Mark Beesley appeared on behalf of the defendants. Plaintiffs Barona Band of Mission Indians and Viejas Band of Mission Indians did not join in plaintiff Sycuan's motions.

The court finds the Autotab Model 101 pull-tab devices to be electronic facsimiles of the game of pull-tab and, accordingly, defines the devices as class III under the Indian Gaming Regulatory Act. The court further finds the amendment of the complaint to add the pendant state law claims would not be futile and, thus, grants the plaintiff's motion to amend.

IT IS HEREBY ORDERED the plaintiff's motion for summary judgment on the second claim is denied and the plaintiff's motion to amend the first amended complaint to add the pendant state law claims is granted.

DATED: 3-30-92

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

v.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

MEMORANDUM DECISION DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING THE PLAINTIFF'S MOTION TO AMEND THE FIRST AMENDED COMPLAINT

INTRODUCTION

The plaintiffs are three Indian tribes who operate gaming centers on their Reservations. The plaintiffs brought this action against the County of San Diego, Sheriff Jim Roache, Deputy Dan Papp, and District Attorney Edwin Miller. In this motion, the Sycuan Band moves for summary judgment on their second claim and to amend the complaint to add pendant state law claims. The Barona and Viejas Bands have not joined in these motions.

In their motion for summary judgment, the Sycuan Band seeks a declaration that the Autotab Model 101 electronic pull-tab dispensers seized by the defendants are class II devices and seek return of the devices. The court finds the devices are electronic facsimiles of the game of pull-tab and,

thus, are class III devices. Accordingly, the court denies the plaintiff's motion for summary judgment.

The plaintiff also seeks to amend the first amended complaint to add pendant state law claims. The court finds the amendment would not be futile. Accordingly, the court grants the plaintiff's motion to amend.

FACTS AND PROCEDURAL HISTORY

This case arises out of the execution of search warrants, issued by a San Diego municipal court, on the Sycuan, Barona, and Viejas Indian Reservations. On October 30, 1991, San Diego County Sheriff's deputies searched the Sycuan, Barona, and Viejas gaming centers, located on the respective Reservations, and seized numerous gaming devices, cash, and records. The gaming devices seized include numerous Autotab Model 101 electronic pull-tab dispensers. The District Attorney's Office subsequently commenced criminal prosecutions against individuals involved in the gaming centers for possession of a slot machine, in violation of California Penal Code § 330.1. These individuals are James Trant, Emmett Munley, Helen Chase, and Anthony Pico.

All three Bands are federally recognized Indian Tribes, with a governing body duly recognized by the Secretary of the Interior and are located in San Diego County. Prior to the commencement gaming operations on the Reservations, each Band was suffering severe economic depression. Specifically, the Bands faced high unemployment and were unable to provide basic governmental services to Tribal members and other Reservation residents. The revenue received from the gaming centers has been used to provide various governmental services and numerous other services, such a scholarships, nutritional programs, and housing rehabilitation.

At the last hearing, this court issued a declaratory judgment and a permanent injunction against the defendants. The declaratory relief included a declaration that the defendants lacked jurisdiction under 18 U.S.C. § 1162 and the Indian Gaming Regulatory Act ("IGRA") to execute the October 1991 warrants and to criminally prosecute the four individuals associated with the gaming centers. The permanent injunction restrained the District Attorney from continuing with the criminal prosecutions against James Trant, Emmett Munley, Helen Chase, and Anthony Pico for possession of a slot machine in violation of California Penal Code § 330.1.

The Sycuan Band now moves for summary judgment on their second claim. The Sycuan Band alleges the Autotab Model 101 electronic pull-tab dispensers are class II devices and seek return of the devices. The Sycuan Band also moves to amend their first-amended complaint to add pendant state law claims.

DISCUSSION

I. MOTION FOR SUMMARY JUDGMENT

The plaintiff alleges the Autotab Model 101 pull-tab devices are electronic aids to the game of pull-tab and, thus, are permissible class II devices under the IGRA. The defendants argue the devices are impermissible class III devices. This court finds the Autotab Model 101 pull-tab devices to be class III devices.

A. STANDARD FOR SUMMARY JUDGMENT

To succeed on a motion for summary judgment, the movant must first demonstrate "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Material facts are those which "might affect the outcome of

the suit under the governing law." *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986). A genuine dispute will exist if the facts indicate "a reasonable jury could return a verdict for the nonmoving party." *Id.*

The facts relating to the operation of the Autotab Model 101 pull-tab devices are not disputed in this case. The defendants state the plaintiff's representation of the operation is accurate, with the exception of "minor omissions." The defendants, however, do not indicate what facts the plaintiff has omitted. The court, therefore, will accept the plaintiff's representations relating to the structure and operation of the Autotab devices as not disputed.

B. CLASSIFICATION OF AUTOTAB MODEL 101 PULL-TAB DEVICES

In 1988, Congress enacted the IGRA to provide a statutory basis for Indian gaming on reservations in order to promote tribal self-sufficiency and to preserve tribal sovereignty. At the same time, Congress was concerned with the potential for the infiltration of organized crime and other criminal elements into Indian gaming. In the IGRA, Congress balanced these concerns and developed an elaborate statutory framework for the regulation of Indian gaming.

Under the IGRA, gaming is categorized as either class I, class II, or class III. 25 U.S.C. § 2703. Class I gaming consists of social games for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations. *Id.* at § 2703(6). Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes. *Id.* at § 2710(a)(1). Congress defined class II gaming as follows:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) —

> . . .
>
> including (if played in the same location) pull-tabs,[1] lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . .

Id. at § 2703(7)(A)(i). Congress also expressly provided that class II gaming does not include "electronic or electromechanical facsimiles of any game of chance . . ." *Id.* at §2703(7)(B)(ii).

Class II gaming continues to be within the jurisdiction of the Indian tribes, but is subject to the provisions of the IGRA. *Id.* at § 2710(b)(1). Class III gaming consists of all other forms of gaming. *Id.* at § 2703(8). Class III gaming activities are lawful on Indian lands only if such activities are authorized by a tribal ordinance, are located in a state that permits such gaming, and are conducted in conformance with a tribal-state compact. *Id.* at § 2710(d)(1).

Because Congress only recently enacted the IGRA, there is no case law further defining the boundaries between class II and class III gaming. The National Indian Gaming Commission ("NIGC"),[1] however, has proposed regulations to implement the definitions under the IGRA. 56 Fed. Reg. 56278 (1991) (to be codified at 25 C.F.R. Part 502). The regulations are merely in the comment stage and, as of the date of this memorandum, have not yet become final. Nevertheless, because the NIGC has expertise in the area of Indian gaming and has spent considerable time discussing the IGRA with tribes and other interested persons, the court finds the proposed regulations to be helpful. Under the proposed regulations, technology in aid of class II gaming is limited to "technology which would enhance the playing of class II theme games, but not technology which would constitute facsimiles of those games." *Id.* at 56279. The

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[1]The NIGC is the federal agency in charge of regulating Indian gaming under the IGRA. 25 U.S.C. §§ 2704, 2706.

regulations further provide, "Where technology goes beyond merely assisting in the playing of a game and becomes the game itself, the Commission proposes that such technology be classified as class III gaming . . ." *Id.* To determine the appropriate classification of the Autotab Model 101 pull-tab devices, the Court must analyze the nature and structure of both the paper version of pull-tab and the Autotab Model 101 pull-tab device.

The paper version of the pull-tab game consists of small laminated paper cards which are packaged in boxes of several thousands. Printed on one exterior surface is information about the game, such as the number of prizes at each prize level. Printed on a surface concealed from view are a combination of symbols. The player pulls back a perforated window from the ???? to reveal whether the card contains a winning combination of symbols. The game consists of a finite pool of tickets containing a fixed, predetermined number of winning tickets at fixed, predetermined, and known prize levels. Because the pool of tickets in the game is finite and fixed, each ticket sold reduces the number of tickets remaining in the pool, thereby directly affecting the chances of subsequent plays producing a winning ticket and ensuring that when all the tickets in a given game have been sold, all the winning tickets will have been distributed.

The Autotab Model 101 electronic pull-tab dispenser consist of an electronically powered computer linked to a video monitor, printer which prints and dispenses winning tickets, and a locked receptacle into which money is deposited by players to activate the use of the dispenser. The pull-tab games are contained in EPROM chips housed in cartridges which the operator plugs into the dispenser within a locked compartment. The cartridge contains the graphical symbols and a complete specification of the game, including the prices of tickets, the number of tickets, the number and amount of all prizes and combination of prizes, and any

rules required by the jurisdiction in which the dispenser is operated. Each game cartridge is initially loaded with 24,000 tickets, evenly divided into one or more identical games.

When a player approaches an Autotab Model 101 dispenser, the player first encounters an idle screen on which images from each of the installed cartridges rotate on the screen. When the player presses any button or inserts money, the screen changes to display the names, ticket prices, and types of games contained in the installed cartridges. Upon selecting one of the games, the player is presented with a "flare" screen showing the details of the structure and winning prize combinations of the game. If the player desires to play that game, the player presses the "Play" button. If enough money has been inserted to purchase a ticket for that game, the dispenser will subtract the price of a ticket from the player's credit balance and display an unopened ticket on the screen. This ticket on the screen replicates the card used in the paper version of pull-tab. The player then presses a button to reveal the symbols under the card.

When a player purchases a ticket from the device, the dispenser uses a "random number generator" to select one of the tickets remaining in the game. Thus, as in the paper version, the total number of tickets remaining is decreased. Because the dispenser contains a finite number of tickets with a finite number of winning tickets, the fluctuation of odds as the tickets are played is the same as that which occurs in the paper version of pull-tab.

After reviewing the nature of the paper version of pull-tab and the Autotab Model 101 electronic device, the court finds the Autotab devices to be "facsimiles" of the paper version of the game of pull-tab. The Autotab device is not merely an aid to the game of pull-tab, but is an electronic version of the paper version. The Autotab device reproduces

electronically the game pull-tab and is itself the game of pull-tab. On a simplistic basis, the two versions look the same. Both depict a paper card that requires the player to reveal symbols to determine if the player wins or loses. Both versions also use the same theory. The game of pull-tab consists of a finite number of tickets with finite number of winning tickets. The fluctuation of the odds is directly tied to the number of tickets purchased. The Autotab device, therefore, is a facsimile of the game of pull-tab and, accordingly, is a class III device.

The plaintiff, however, contends the court should adopt a broad test to distinguish between the two classes of gaming devices. Specifically, the plaintiffs argue the court should classify the Autotab devices as class II if the Autotab devices "preserve the fundamental characteristics" of the game of pull-tab. For this argument, the plaintiff relies on a single sentence in the legislative history and on the principle of statutory interpretation that any ambiguities should be interpreted in favor of the Indian tribe. *See Barona Group v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982).

The adoption of this test would render meaningless the term "facsimile" and Congress's distinction between "aids" to a game and "facsimiles" of a game. By definition, a device that preserves the fundamental characteristics of a game is a facsimile of the game. In the IGRA, Congress expressly dictated courts to classify electronic facsimiles of a game as class III devices. Even if, as the plaintiff alleges, the electronic version is less susceptible to tampering, the court is not free to disregard the common meaning of terms used by Congress or to ignore distinctions intended by Congress. *California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1988).

Further, the plaintiff's argument is not consistent with the portion of the legislative history relied on by the plaintiff. In the legislative history, Congress states its intent that tribes

have the "maximum flexibility to utilize games such as bingo and lotto for tribal economic development." S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3079. The Senate Report continues:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

Id. This portion does not indicate that Congress intended tribes to utilize technological advances to duplicate existing games and provide electronic facsimiles of permissible games. Congress is merely allowing the use of technology to

broaden the participation in a permissible game, to enhance a permissible game, or to otherwise assist in a permissible game. Expanding participation by use of a cable is a clear example of an "electronic aid." Another clear example of an aid is the electronic scoreboard by the Sycuan Band in the game of bingo. Congress, however, clearly stated that the aids must be readily distinguishable as an electronic reproduction of a game. The court, therefore finds the legislative history does not support the plaintiff's argument.

This court is mindful of the principle that ambiguous statutes should be interpreted in favor of the Tribe. *Barona Group*, 694 F.2d at 1190. The court agrees with the plaintiff that the IGRA provides little guidance in distinguishing "aids" from "facsimiles." The court, however, does not find that an ambiguity exists in applying the IGRA to the present situation. The Autotab device is clearly an electronic reproduction of the game of pull-tab and is itself the game of pull-tab. Accordingly, the court does not find the well-established principle of interpretation to be applicable in this case.

In sum, the court finds the Autotab Model 101 pull-tab dispensers to be electronic facsimiles of the game of pull-tab. Consequently, the devices at issue are class III devices.

II. MOTION TO AMEND

The plaintiff also seeks to amend the first amended complaint to add pendant state law claims. Because the amendment would not be futile, the court grants the plaintiff's motion.

A. STANDARD FOR MOTION TO AMEND

Whether to allow an amendment is within the district court's discretion. *Klamath-Lake v. Klamath Medical Svc.*, 701 F.2d 1276, 1292 (9th Cir. 1983). In determining whether to allow an amendment, the court may consider

"the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, and undue prejudice." *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989). Leave to amend should be freely given, but may be denied if the amended claims are legally insufficient and amendment would be futile. *Miller v. Rykoff-Sexton* 845 F.2d 209, 214 (9th Cir. 1988). An amendment is futile "only if no set of facts can be proved . . . that would constitute a valid claim." *Id.*

Pursuant to California's Torts Claim Act, the plaintiff filed a timely claim, on November 13, 1991, with the County for damages resulting from the October raid. Cal. Gov't Code § 945.4. The plaintiff must first file a claim with the County and give the County an opportunity to deny the claim before seeking judicial review of the state claims. *Id.* at § 945.4. In this case, the plaintiff's claim has been deemed denied because forty-five days have elapsed and the County has failed to act on the claim. *Id.* at § 911.6. The plaintiff now seeks to amend the complaint to add the pendant state law claims. The claims allege (1) the defendants' entry onto the Reservation constituted a bad faith trespass, (2) the defendants' seizure of items during the raid constituted a bad faith conversion, and (3) the defendants interfered with the plaintiff's business by detaining individuals without probable cause.

Allowing the amendment would not result in prejudice to defendants, and the plaintiffs have not acted in bad faith or delayed the bringing of this motion. The pendant state law claims arise from the same set of facts as the federal claims, and the plaintiff has diligently pursued its claims. The defendants, however, argue allowing the amendment would be futile because state law claims are clearly legally insufficient.

The defendants first argue they did not trespass because they had authority under 18 U.S.C. § 1162 to enforce the state gaming laws on the Reservation. This court, however, previously declared section 1162 did not provide authority to the defendants to enforce the state gaming laws on the Reservation. The defendants also allege the gaming center was open to the public and, thus, the defendants could not have been trespassing. The defendants fail to cite any authority for this proposition. Further, whether the Reservation is an open or public forum raises a question of fact. This issue would be more appropriately addressed on a motion to dismiss or for summary judgment.

The defendants next argue the plaintiff may not pursue a false imprisonment claim. It does not appear the plaintiff is pursuing this type of a claim. In the second amended complaint, the plaintiff merely alleges the defendants unlawfully interfered with the plaintiff's business by detaining and arresting persons when there was no probable cause for such action. This is a claim for interference with business and not a claim for false imprisonment. The defendants' argument, therefore, is without merit.

The defendants also contend the plaintiff cannot assert a claim for conversion because the plaintiff does not have a property right in contraband. The plaintiff's claim is not limited to damages for the seizure of the Autotab devices. The claim also involves the seizure of records and cash. Further, complex legal and factual questions govern whether the plaintiff can recover for seizure of the class III devices. Accordingly, the defendants' argument would be more appropriately raised in a motion to dismiss or for summary judgment.

The court requests further briefing as to its authority to order the defendants to return the Autotab devices either to the plaintiffs or to the owner of the devices. The court feels it would serve no useful purpose for the defendants to

destroy the devices or to refuse to return the devices to the plaintiffs, on the condition the plaintiffs agree not to install the devices in the absence of a tribal-state compact or modification to the device, or to the owner, on the condition the owner agrees not to install the devices in California in the absence of a tribal-state compact permitting the devices. The parties should include a discussion on whether the court has jurisdiction over the nonparty owner of the devices. The court requests this briefing because the court finds the plaintiffs have acted in good faith at all times. The classification of the devices involved a close and hotly disputed question. The plaintiffs installed the Autotab devices prior to the NIGC's promulgation of the regulations clarifying the distinction between class II and class III gaming. Further, the plaintiffs' argument regarding their proposed functional test to distinguish class II from class III gaming may be meritorious. In sum, the defendants have yet to provide the court with sufficient justification for their refusal to return the devices.

Finally, the defendants contend they are immune under California law. California, however, does not immunize the defendants for acts committed outside the scope of their authority. *Read v. City of Lynwood*, 173 Cal.App.3d 437 (1985). Again, because this issue raises questions of fact not subject to resolution at this point, the defendants should raise this issue in a motion to dismiss or for summary judgment.

In sum, the defendants have failed to establish the amendment of the complaint would be futile. The court, therefore, grants the plaintiff's motion to amend the first amended complaint to add the pendant state law claims.

IT IS SO ORDERED:

DATED: 3-30-92

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

vs.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

BARONA BAND OF MISSION INDIANS, a/k/a BARONA GROUP OF THE CAPTAIN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, and VIEJAS BAND OF MISSION INDIANS, a/k/a VIEJAS GROUP OF THE CAPTIAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe.
Plaintiffs.

vs.

JIM ROACHE, individually and in his official capacity as Sheriff of the County of San Diego; DAN PAPP, individually and in his official capacity as a Deputy Sheriff of the County of San Diego; the COUNTY OF SAN DIEGO, a political subdivision of the State of California, and EDWIN L. MILLER, JR., individually and in his official capacity as District Attorney of the County of San Diego,
Defendants.

CASE NO. 91-1669 H (BTM)

ORDER GRANTING INTERVENTION AND DENYING THE INTERVENORS' AND PLAINTIFFS' MOTION TO RETURN THE SEIZED DEVICES

This cause came on to be heard on April 27, 1992, at 10:30 a.m., before the Honorable Marilyn L. Huff. The owner and lessor of the seized Autotab Model 101 devices, Video Autotab, Inc., moves the court for intervention. These devices were seized from the Sycuan Reservation and the court previously classified the devices as class III devices. In addition, Interstate Gaming Services, Inc., the owner and lessor of the devices seized from the Barona and Viejas Reservations, moves the court for intervention. The court has not yet classified these devices. The court finds Video Autotab and Interstate Gaming Services satisfy the requirements of Federal Rule of Civil Procedure 24(a) and (b). Accordingly, the court grants their motions for intervention as of right or, in the alternative, for permissive intervention.

Video Autotab, Interstate Gaming Services, and the plaintiffs also move the court for the return of the property seized in the October 1991 search pursuant to Federal Rule of Criminal Procedure 4a (e). The seized property may have potential evidentiary value in a subsequent federal criminal prosecution or forfeiture proceeding and, consequently, the court finds the return of the seized property would be unreasonable at this time. The parties' motion, therefore, is denied. In addition, because of the evidentiary value of the property, the court orders the defendants not to alter or destroy the property without further order of the court.

IT IS HEREBY ORDERED that Video Autotab's motion and Interstate Gaming Device's motion to intervene are granted, and Video Autotab's, Interstate Gaming Services, and the plaintiffs' motion for return of the seized property is denied.

IT IS FURTHER ORDERED that the defendants may not alter or destroy the seized property without further order of the court.

IT IS SO ORDERED.

DATED: April 29, 1992

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

vs.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

BARONA BAND OF MISSION INDIANS, a/k/a/ BARONA GROUP OF THE CAPTAIN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, and VIEJAS BAND OF MISSION INDIANS, a/k/a/ VIEJAS GROUP OF THE CAPTAIN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,
Plaintiff,

vs.

JIM ROACHE, individually and in his official capacity as Sheriff of the County of San Diego; DAN PAPP, individually and in his official capacity as a Deputy Sheriff of the County of San Diego; THE COUNTY OF SAN DIEGO, a political subdivision of the State of California; and EDWIN L. MILLER, JR., individually and in his official capacity as District Attorney of the County of San Diego,
Defendants.

CASE NO. 91-1669 H (BTM)

MEMORANDUM DECISION GRANTING INTERVENTION AND DENYING THE INTERVENORS' AND PLAINTIFFS' MOTION TO RETURN THE SEIZED DEVICES

INTRODUCTION

The plaintiffs are three Indian tribes who operate gaming centers on their Reservations. The plaintiffs brought this action against the County of San Diego, Sheriff Jim Roache, Deputy Dan Papp, and District Attorney Edwin Miller. In this motion, Video Autotab Inc. seeks to intervene in the action and seeks the return of the Autotab Model 101 devices seized by the defendants from the Sycuan Reservation. Plaintiff Sycuan Band joins in Video Autotab's motion for return of the devices and also seeks return of the seized money, records, and game cartridges. In addition, Interstate Gaming Services, Inc. seeks the return of the devices seized by the defendants from the Barona and Viejas Reservations. Plaintiffs Barona Band and Viejas Band seek the return of the devices to the Reservations from which they were seized.

The court finds Video Autotab and Interstate Gaming Services satisfy the requirements of Federal Rule of Civil Procedure 24(a) and (b). Accordingly, the court grants the companies' motions for intervention as of right or, in the alternative, grants permissive intervention. The court, however, denies the companies' and the plaintiffs' motion for return of the property pursuant to Federal Rule of Criminal Procedure 41(e). The seized property may have potential evidentiary value in a subsequent federal criminal prosecution or forfeiture proceeding and, accordingly, the court finds the return of the seized property would be unreasonable at this time. The court, therefore, denies the motions for return of the seized property.

BACKGROUND

This case arises out of the execution of search warrants, issued by a San Diego municipal court, on the Sycuan, Barona, and Viejas Indian Reservations. On October 30, 1991, San Diego County Sheriff's deputies searched the Sycuan, Barona, and Viejas gaming centers, located on the respective Reservations, and seized numerous gaming devices, cash, and records. The gaming devices seized include numerous Autotab Model 101 electronic pull-tab dispensers. The District Attorney's Office subsequently commenced criminal prosecutions against four individuals involved in the gaming centers for possession of a slot machine, in violation of California Penal Code § 330.1.

The court previously issued a declaratory judgment and permanent injunction against the defendants. The declaratory relief included a declaration that the defendants lacked jurisdiction under 18 U.S.C. § 1162 and the Indian Gaming Regulatory Act ("IGRA") to execute the October 1991 warrants and to criminally prosecute four individuals associated with the gaming centers. The permanent injunction restrains the District Attorney from continuing with the criminal prosecutions against the four individuals for possession of a slot machine in violation of California Penal Code § 330:1. At the last hearing, the court denied plaintiff Sycuan Band's motion for summary judgment relating to the classification of the seized Autotab devices. The court found the devices to be electronic facsimiles of the game of pull-tab and, thus, classified the devices as class III. Consequently, the Indian Gaming Regulatory Act does not permit the installation of these devices on the Sycuan Reservation because the plaintiff has not entered into a tribal-state compact. Plaintiffs Barona Band and Viejas Band have not yet requested a classification of the devices seized from their Reservations.

In the present motions, Video Autotab, the owner and lessor of the Autotab Model 101 devices seized from the Sycuan Reservation, seeks to intervene in the action and seeks the return of the Autotab devices. Plaintiff Sycuan Band joins in Video Autotab's motion for the return of the devices and also seeks the return of money, records, and gaming cartridges seized during the October 1991 search. In addition, Interstate Gaming Services, the owner and lessor of the devices seized from the Barona and Viejas Reservations, seeks to intervene and seeks the return of the devices seized from the Barona and Viejas Reservations. Plaintiffs Barona Band and Viejas Band ask the court to return the devices to the Reservations from which they were seized.

DISCUSSION

A. MOTION TO INTERVENE

Video Autotab and Interstate Gaming Services move this court for intervention in the action. The court grants the motions to intervene as of right or, in the alternative, for permissive intervention.

Federal Rule of Civil Procedure 24(a) permits an applicant to intervene if (1) the application to intervene is timely, (2) the applicant claims an interest in the subject of the action, and (3) the applicant's interest may be impaired by the disposition of the action and is not adequately represented by the current parties to the action. *United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). To determine if an application is timely, the court must analyze the stage of the proceedings at which the applicant seeks intervention, any prejudice resulting to the parties, and the reason for any delay. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir. 1981).

First, the applicants for intervention have moved for intervention in the action in a timely manner. The compa-

nies seek to intervene for the limited purpose of arguing for the return of the seized devices. The court only recently held a hearing on the appropriate disposition of the devices seized from the Sycuan Reservation and continued the hearing for further briefing. Video Autotab now has provided the court with briefing prior to the hearing. The court has yet to resolve the classification of the devices seized from the Barona and Viejas Reservations. The current parties also do not oppose intervention and, thus, the intervention will not prejudice the parties. Second, the applicants have asserted an interest in the subject matter of the action. The applicants are the owners and lessors of the gaming devices seized by the defendants in the October 1991 search. This action involves the classification and disposition of these devices. Third, the action may impair the companies' interest in the devices, because this court has already classified the devices seized from the Sycuan Reservation as impermissible class III devices and, in future proceedings in this action, may classify the devices seized from the Barona and Viejas Reservations. In addition, the plaintiffs may not adequately represent the applicants' interests. The court previously classified the Autotab devices seized from the Sycuan Reservation as class III. Because plaintiff Sycuan Band may not install the Autotab devices on the Sycuan Reservation, the plaintiffs may not have an incentive to actively seek return of the devices to Video Autotab. Further, the Barona and Viejas Bands have not moved for return of the devices seized from their Reservations until this hearing, and they ask the court to return the devices to the Reservations rather than to Interstate Gaming Services. The court, therefore, grants the applicants' motion to intervene as of right.

Even if the applicants did not satisfy the requirements to intervene as of right, the court would allow permissive intervention. Federal Rule of Civil Procedure 24(b) provides for intervention, within the court's discretion, if the

applicant's claim and the pending action involve a common question of law or fact. *Venegas v. Skaggs,* 867 F.2d 527, 530 (9th Cir. 1989). As discussed above, the action involves the appropriate disposition of the applicants' devices. Accordingly, the court exercises its discretion to allow permissive intervention.

B. MOTION TO RETURN PROPERTY

Video Autotab and Interstate Gaming Services next move this court for a return of the seized devices, pursuant to Federal Rule of Criminal Procedure 41(e). Plaintiff Sycuan Band supports Video Autotab's motion to return the devices to Video Autotab. Plaintiff Sycuan Band also moves the court for a return of the seized money, records, and game cartridges. Plaintiffs Barona and Viejas Bands seek the return of the devices to the Reservations from which they were seized.

Rule 41(e) allows a party to move for the return of seized property in the district in which the property was seized.[1] Fed. R. Crim. P. 41(e). The Rule provides for the return of property if the property was illegally seized and the movant is legally entitled to possession of the property.[2] The court has jurisdiction to return illegally seized property, pursuant

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[1] Because the court declines to order the return of the property, the court need not resolve whether Rule 41(e) provides for the return of property illegally seized by state authorities. The court notes, however, that Rule 41(e), by its terms, is not limited to illegal seizures by federal authorities. Further, Rule 41(a) governs the issuance of a warrant to state authorities for alleged violations of federal law.

[2] Rule 41(e) provides:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property . . . If the motion is granted, the property shall be returned to

to Rule 41(e), if no criminal proceedings are pending against the movant. *United States v. Martinson,* 809 F.2d 1364, 1366-67 (9th Cir. 1987). Although Rule 41(e) is contained within the Federal Rules of Criminal Procedure, a Rule 41(e) motion filed prior to an indictment against the movant is deemed a civil equitable proceeding. *In re Grand Jury Subpoenas,* 926 F.2d 847, 855 (9th Cir. 1991).

The focus of the court's analysis under Rule 41(e) is whether the return or retention of the property is reasonable under all the circumstances. Fed. R. Crim. P. 41(e), Notes of Advisory Committee on Rules, 1989 Amendment (hereafter "Advisory Notes"). If an investigation is pending, the movant has the burden to prove lawful entitlement to the property. *Martinson,* 809 F.2d at 1369. If, however, criminal proceedings have been terminated or abandoned, the movant is generally entitled to the property and the government must establish a legitimate reason for retaining the property. *Id.* At this point, the property no longer has evidentiary value and it is generally unreasonable for the government to retain possession of the property. *Id.* at 1369 n.4. If, however, the United States has a need for the property in an investigation or possible prosecution, retention of the property is generally reasonable. Advisory Notes, 1989 Amendment.

The court previously held the defendants were without authority under Public Law 280 and the Indian Gaming Regulatory Act to enter the Reservations and seize the property. The court, however, finds it would not be reasonable to order the return of the property at this time. The United States has indicated an interest in determining whether a forfeiture proceeding is appropriate. The court is not aware of the United States' interest, if any, in pursuing criminal proceedings. The seized property, therefore, retains

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the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings.

potential evidentiary value.[3] Until the United States informs the court it does not wish to pursue criminal or civil proceedings or a significant amount of time elapses, indicating an abandonment of pursuing future proceedings, the court declines to order the return of the seized property.[4] The parties' motion, however, is denied without prejudice, permitting the parties to again move the court for a return of the property if the United States' intentions become clearer. In addition, the court has not yet classified the devices seized from the Barona and Viejas Reservations. The court, therefore, finds it would not be prudent to order the return of these devices at this early stage of the proceedings.

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[3] At this stage, the court need not resolve whether the seized property would be admissible in a subsequent federal criminal prosecution or forfeiture proceeding. *See* Advisory Notes, 1989 Amendment. In the 1989 amendments to Rule 41(e), language was deleted providing that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return property under Rule 41(e). This language created unnecessary confusion and was inconsistent with the development of the exclusionary rule doctrine. *Id.*

[4] This case is clearly distinguishable from the municipal court's decision in *Table Mountain Rancheria Band of Indians v. Maqarian*, No. 63276-0 (Mar. 27, 1992). In *Table Mountain*, the court ordered the return of seized property because the court found the defendants were without authority to seize the property. In that case, the devices had been classified as permissible class II devices and federal prosecution was "unlikely." *Id.* at 20. In this case, however, the court has not classified the devices as class II and the court is not aware of the likelihood of a subsequent federal prosecution. The case of *Table Mountain*, therefore, is not persuasive authority for the return of the seized property.

Finally, because of the possible evidentiary value of the seized property, the court orders the defendants not to alter or destroy the property without prior court approval.

IT IS SO ORDERED:

DATED: April 29, 1992

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

certain circumstances, seek an award of attorneys' fees and costs, and good cause appearing therefor,

IT IS HEREBY ORDERED that the permanent injunction entered on March 4, 1992, is herewith modified and the defendants shall be permitted to return the seized gaming-related property pursuant to the terms of the Stipulation;

IT IS FURTHER ORDERED that said Stipulation is approved, and final judgment shall be entered in accordance with the terms of said Stipulation.

DATED: December 11, 1992

MARILYN L. HUFF
Judge of the District Court

Prepared by:

LLOYD M. HARMON, JR., County Counsel
DIANE BARDSLEY, Chief Deputy

By: R. MARK BEESLEY
R. MARK BEESLEY, Deputy
Attorneys for Defendants Jim Roache, Deputy
The County of San Diego and Dan Papp

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

vs.

JIM ROACHE individually, and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

BARONA BAND OF MISSION INDIANS, a/k/a/ Barona Group of the Captain Grande Band of Mission Indians, a federally-recognized Indian Tribe, and VIEJAS BAND OF MISSION INDIANS, a/k/a/ VIEJAS GROUP OF THE CAPTAIN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,
Plaintiff,

vs.

JIM ROACHE, individually and in his official capacity as Sheriff of the County of San Diego; DAN PAPP, individually and in his official capacity as a Deputy Sheriff of the County of San Diego; the COUNTY OF SAN DIEGO, a political subdivision of the State of California, and EDWIN L. MILLER, JR., individually and in his official capacity as District Attorney of the County of San Diego,
Defendants.

CASE NO. 91-1669 H (BTM)

MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

FACTS

SYCUAN BAND

The Sycuan Band of Mission Indians is a federally recognized Indian Tribe, with a governing body duly recognized by the Secretary of the Interior. The Sycuan Indian Reservation is located in San Diego County, near the City of El Cajon.

Prior to the commencement of gaming operations on the Reservation, the Band was suffering severe economic depression. The Band was unable to provide basic governmental services to Tribal members and other Reservation residents. Sanitation conditions were grossly substandard, and the lack of a reliable supply of portable water was a persistent problem.

The Sycuan Gaming Center offers Bingo, card games, and the opportunity to wager on horseraces pursuant to a simulcast wagering compact negotiated between the Band and the State of California. The plaintiff alleges the Band has not consented to the conferral of jurisdiction upon the State of California to apply and enforce California's gaming laws against the Band beyond this simulcast wagering compact. The Center also offered fifty-two Video Autotab Model 101 electronic pull-tab dispensers. The net receipts from these dispensers averaged $4,900 per day for the months of September and October 1991.

On October 30, 1991, San Diego County Sheriff's deputies searched the Sycuan Gaming Center and seized fifty-two Video Autotab Model 101 electronic pull-tab dispens-

ers. The deputies had obtained a search warrant from the Municipal Court of San Diego. The District Attorney's Office later initiated a criminal prosecution against James Trant for possession of a slot machine, in violation of Cal. Penal Code § 330.1. At the request of the plaintiff, the District Attorney's office continued the arraignment until December 13, 1991.

On November 22, 1991, this court issued a temporary restraining order against the County defendants and the District Attorney's office. The order prohibited the defendants from searching for or seizing any gaming devices pending the hearing on the preliminary injunction; arresting, implementing, or continuing criminal prosecutions against persons who allegedly are in violation of California's gaming laws; and destroying or removing the seized devices.

BARONA BAND

The Barona Band is a federally-recognized Indian tribe, with a governing body duly recognized by the Secretary of the Interior. The Reservation consists of "Indian lands" as defined in IGRA, and is located in San Diego County, near Lakeside.

The Barona Band also suffered substandard conditions and unemployment prior to the institution of gaming on the Reservation. The Band members were extremely poor and unemployment was very high. The Gaming Center has provided employment for thirty-one tribal members and seventy-five others. Revenue from the gaming center has provided college scholarships, nutritional programs, equipment for elementary school children, and various governmental services.

Initially, the Barona Band offered only live bingo and pull-tabs. In December 1990, the Band began to offer electronic forms of bingo, lotto, pull-tabs, and poker. On

November 1, 1991, the Band added a card room in order to offer poker and other card games.

On October 28, 1991, San Diego County Sheriff deputies obtained a search warrant from a San Diego Municipal Court to search the Barona Reservation for allegedly illegal gaming devices. On October 30, 1991, the deputies seized cash, records, and approximately 90 gaming devices, including 20 electronic pull-tab devices, 20 electronic lotto devices, and 50 electronic poker devices. The complaint alleges these devices generated approximately $7,750 per day. The District Attorney's office also commenced a criminal prosecution against Emmett Munley and Helen Chase. The status of the arraignments of these individuals is unclear. At the plaintiff's request, the District Attorney's office initially continued the arraignments until December 5, 1991.

VIEJAS BAND

The Viejas Band also is an Indian Tribe, with a governing body duly recognized by the Secretary of the Interior. The Viejas Reservation is "Indian land" under the IGRA, and is located in San Diego County, near Alpine. Like the other two Bands, the Band also suffered substandard conditions and unemployment prior to offering gaming on September 13, 1991. With the opening of the Gaming Center, unemployment dropped from 55% to 45%. The complaint alleges that the unemployment rate would have been reduced ultimately to 20%. Revenues from the Gaming Center provide basic governmental services and other programs such as scholarships, housing rehabilitation, and courses teaching the indigenous Digueno language to the tribal members.

The Band offers live card games, off-track betting on horse races under a compact with the State of California, electronic bingo, lotto, pull-tab, and poker devices. The Band alleges it has not consented to state jurisdiction other

than agreeing to operate the horseracing facility in conformity with California's gaming laws.

On October 28, 1991, San Diego County Sheriff's deputies obtained a search warrant from a San Diego Municipal Court to search the Reservation for allegedly illegal gaming devices. The deputies executed the warrant on October 30, 1991 and seized cash, records, and approximately ninety-six gaming devices, including nineteen electronic pull-tab devices, seventeen electronic bingo devices, forty electronic poker devices, and twenty electronic lotto devices. The complaint alleges these devices generated approximately $8,500 per day. The District Attorney's Office also commenced a criminal prosecution against Anthony Pico. The status of this prosecution is not known.

Subsequent to the TRO issued in the Sycuan case, the Barona and Viejas Bands filed an amended complaint virtually identical to the Sycuan Band's complaint. In the Barona and Viejas Bands cases, the County Counsel and the District Attorney's office have stipulated to a TRO which mirrors the TRO issued in the Sycuan case. The Sycuan, Barona and Viejas Bands now seek a preliminary injunction pending trial. They seek an injunction restraining the defendants from searching for and seizing gaming devices allegedly in violation of California's gaming laws; arresting, commencing, or continuing criminal prosecutions for alleged violations of California's gaming laws; destroying the seized devices; and refusing to return the seized devices.

DISCUSSION

I. STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Preliminary injunctive relief is available if the party meets one of two tests: "(1) a combination of probable success and the possibility of irreparable harm, or (2) that serious

questions are raised and the balance of hardship tips in its favor." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* Under both formulations, however, the party must demonstrate a "fair chance of success on the merits" and a "significant threat of irreparable injury." *Id.* Further, if a case implicates the public interest, the court must also consider this factor. *Caribbean Marine Svcs. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

II. SUCCESS ON THE MERITS

As discussed at the hearing on the TRO, Congress created a comprehensive statutory scheme for the regulation of Indian gaming by enacting the IGRA. Although there has not been much case law on the extent of state jurisdiction under IGRA, the published cases to date have concluded that a state may assert civil or criminal jurisdiction under the IGRA "*only* when a tribal-state compact has been reached to regulate Class III gambling." *Keetowah Indians v. State of Oklahoma*, 927 F.2d 1170 (10 Cir. 1991); *accord Lac du Flambeau Band v. Wisconsin*, 743 F.Supp. 645 (D. Wis. 1990). After thoroughly reviewing the statutory scheme of IGRA, these courts have concluded that IGRA leaves no role for state enforcement of gaming laws, unless and until the state negotiates a tribal-state compact in which the tribe consents to the state's particular exercise of jurisdiction.

Nevertheless, the defendants contend they do have authority to conduct preliminary law enforcement activities and/or to criminally prosecute individuals for alleged violations of the IGRA. The defendants offer the following arguments which they contend establish their authority to engage in the challenged conduct.

A. JURISDICTION UNDER 18 U.S.C. § 1162 (PUBLIC LAW 280)

Both the defendants and amicus argue that the defendants have jurisdiction to enforce California's gaming laws under 18 U.S.C. § 1162. Under section 1162, Congress granted six states, including California, jurisdiction over offenses committed by Indians on Indian lands. The extent of the state's jurisdiction is the same as that which it could exercise elsewhere in the state. The criminal laws are to have "the same force and effect within the Indian country" as they do elsewhere within the state. This section, however, does not give the state the jurisdiction to enforce its civil regulatory powers upon the tribes. *California v. Cabazon Band of Mission Indians,* 480 U.S. 208 (1987). Regarding the state's civil regulatory powers, Congress has enacted 28 U.S.C. § 1360 to allow for a limited grant of civil jurisdiction to the states. *Bryan v. Itasca County,* 426 U.S. 373 (1976). Section 1360 is essentially limited to providing Indians a forum to settle private disputes amongst themselves, and is not a grant to the states to exercise their civil regulatory powers over the tribes. *Confederated Tribes v. State of Washington,* 938 F.2d 146, 147 (9th Cir. 1991).

To determine if a state may enforce a particular law under section 1162, the court must decide whether the law is criminal/ prohibitory or civil/regulatory. *Cabazon,* 480 U.S. at 208. If the former, the state may enforce the law on the reservation. However, if the latter, the state is without authority pursuant to section 1162 to enforce the law. The focus of the inquiry is whether the state has indicated that the conduct at issue is against the state's public policy. *Id.* at 209. That a particular law is enforceable through criminal means does not necessarily indicate that the law is criminal/prohibitory. *Id.* at 211.

The defendants argue the analysis required to make this determination should focus on the particular law prohibiting

slot machines and not on California's gambling laws as a whole. The defendants narrowly interpret *Cabazon* by contending that the Court held that California's *bingo* laws were civil/regulatory, but did not hold California's *gaming* laws were civil/regulatory.

The defendants' contention that *Cabazon* should be interpreted narrowly is without merit. The Ninth Circuit has held that, in order to protect Indian sovereignty from state interference, a court should resolve any doubts concerning the characterization of a law in favor of the Indians. *Confederated Tribes v. State of Washington,* 938 F.2d 146, 149 (9th Cir. 1991). Thus, any doubts concerning the characterization of California's gambling laws in general or its laws relating to slot machines should be resolved in favor of finding the laws to be civil/regulatory.

The defendants also may be misinterpreting the Supreme Court's analysis in *Cabazon.* In determining the characterization of the bingo laws, the Supreme Court analyzed California's gaming laws as a whole and did not merely focus on the limitations to the game of bingo within the state. The Court began its analysis by noting that "California does not prohibit all forms of gambling," and proceeded to list certain forms of gambling allowed. *Id.* at 210. Although the Court acknowledged that the state prohibited certain forms of gambling, the Court noted that California allows numerous forms of gambling, including "encouraging its citizens to participate in state-run gambling" by operating a state lottery, and permitting parimutuel horse-race betting. Based on the state's allowance of a "substantial amount of gambling activity," the Court concluded that "California *regulates* rather than prohibits *gambling in general and bingo in particular.*" *Id.* at 211.

A recent Ninth Circuit decision also employed a broader analysis and did not focus solely on the laws prohibiting a certain activity. *Confederated Tribes v. State of Washington,*

938 F.2d 146 (9th Cir. 1990). In *Confederated,* a tribal member was cited for speeding on the Indian reservation. The state argued it had jurisdiction to enforce its speeding laws on the reservation pursuant to section 1162. Specifically, the state argued its speeding laws were criminal/prohibitory because the state prohibits speeding in all circumstances and makes no exceptions to this prohibition. The Ninth Circuit concluded the state's analysis was erroneous. The appropriate inquiry is whether the "prohibited activity is a small subset of a larger permitted activity or whether all but a small subset of a basic activity is prohibited." *Id.* at 149. The court held that the state's speeding laws were civil/regulatory because, while speeding is prohibited, driving is generally permitted within the state. Therefore, the speeding laws, a subset of the state's more general driving laws, were civil/regulatory and unenforceable under section 1162.

The defendants present several cases which they contend indicate that this court should adopt a narrower analysis. These cases are distinguishable. First, *United States v. Marcyes*, 557 F.2d 1361, 1362 (9th Cir. 1977), involved a state's complete prohibition of the possession of fireworks. The laws prohibiting fireworks were not a subset of a larger, permitted activity. The state did not permit some types of fireworks and absolutely prohibit others. Rather, the state completely prohibited the private possession of fireworks. Thus, consistent with the Court's broader analysis in *Cabazon*, the firework laws were held to be criminal/prohibitory. Second, *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987), involved the characterization of New Mexico's laws prohibiting greyhound racing, and the court characterized the laws as criminal/prohibitory. Contrary, however, to California's gambling laws, New Mexico prohibits almost all forms of gambling. Therefore, New Mexico's gambling laws in general may be classified as criminal/prohibitory.

B. JURISDICTION UNDER IGRA

(1) COUNTY DEFENDANTS

The County defendants contend that IGRA provides them with authority to investigate alleged violations of IGRA.

(a) Jurisdiction Under Section 1166 & Legislative History.

The County defendants first imply they have authority under section 1166(a) of IGRA. This section provides:

> [F]or purposes of federal law, all state laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the state.

This section merely incorporates or federalizes state law. Thus, the content of federal law under the IGRA is defined by state law. It, however, is a basic principle of federal jurisdiction that, by federalizing a body of state law, Congress does not necessarily intend to grant concurrent jurisdiction to the state courts to enforce the new federal rights. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 389 (1938); *De Sylva v. Ballentine*, 351 U.S. 570 (1956). Rather, by federalizing state law, Congress has chosen to incorporate existing law rather than create a uniform body of law governing each of the states.

Further, the federalization of state law appears to have been part of the compromise given to the states by Congress when balancing the interests implicated by Indian gaming. In the legislative history, Congress first notes that Congress, and not the courts as in *Cabazon*, should strike the appropriate balance to determine the extent to which states can enforce their gaming laws on reservations. S.Rep. No. 466,

100th Cong., 2d Sess. 3, *reprinted* in, U.S. Code Cong. & Admin. News at 3073. In striking this balance, Congress acknowledged the interest of the states to enforce their gaming laws on reservations and, particularly, to prohibit gaming that would be illegal if performed elsewhere in the state. Congress also was aware of the concern of the states and the Department of Justice ("DOJ") over the potential for the infiltration of organized crime and other criminal elements. The DOJ argued that the states had the expertise and the experience to regulate and enforce its gaming laws on the reservations. Congress, however, also acknowledged the tribes' strong aversion to any extension of state jurisdiction onto the reservations. With regard to the tribes' interests, Congress acknowledged the

> "well-established principles of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of state governments and the application of state laws do not extend to Indian lands [and] that even when Congress has enacted laws to allow a limited application of state law on Indian lands, the Congress has required the consent of tribal governments before state jurisdiction can be extended to tribal lands.

Id. at 3075. In striking a balance between the interests of the states and the tribes, Congress sought to preserve these principles. *Id.*

Congress balanced the competing rights to develop a jurisdictional framework for the regulation of gaming activities on Indian land. A review of the legislative history indicates that the jurisdictional framework under the IGRA provides for state jurisdiction only when the state enters into a compact with the tribe. The legislative history provides:

> [U]nless a tribe affirmatively elects to have state laws and state jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow state jurisdic-

> tion on Indian lands for the regulation of Indian gaming activities.
>
> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of state jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-state compact. *In no instance, does S. 555 contemplate the extension of state jurisdiction or the application of state laws for any other purpose.*

Id. at 3075-76. The balance struck by Congress under the IGRA appears to be that the state laws governing gaming apply, for the most part, with the same force and effect the laws would have elsewhere in the state. Thus, by federalizing state law, the states could, for the most part, define the boundary between legal and illegal gaming, and could be assured that activities that would be illegal if performed outside the reservation boundaries would also be illegal within the reservation boundaries. The definition of legal versus illegal gaming, however, appears to be the limit of state authority over Indian gaming. Under the IGRA, it appears the tribes can be assured that the states will not have jurisdiction over the reservations to enforce their gaming laws unless the tribe chooses to allow state jurisdiction by negotiating a tribal-state compact.

Yet another reason for Congress to federalize state law, other than to grant concurrent state jurisdiction, is apparent in the legislative history. A prior bill that would regulate gaming, S. 1303, would have required the federal Gaming Commission to develop a comprehensive regulatory scheme for gaming on reservations. *See id.* at 3097-98. Congress members opposed to this bill were concerned that the creation of a new body of gaming law would be a waste of federal resources, because the states already had comprehensive laws and regulatory systems governing gaming. Therefore, it appears the federalization of state law was a

more efficient and equitable means to regulate Indian gaming, and was not intended to extend state jurisdiction over the gaming.

(b) "Criminal Prosecution" v. Preliminary Law Enforcement Activities

The defendants next argue that, while there may not be state authority to criminally prosecute violations of IGRA, Congress did not intend to preclude state law enforcement officials from engaging in preliminary law enforcement activities, such as searching for and seizing gaming devices allegedly in violation of IGRA and arresting individuals allegedly involved in illegal gaming. The defendants offer several grounds for their argument.

(1) Statutory Interpretation

First, the defendants contend that the term "criminal prosecution" should be narrowly interpreted by the court to exclude state jurisdiction only over that phase of a state's criminal jurisdiction. The defendants' argument, however, is contrary to well-established principles of construction. Any ambiguities in IGRA should be resolved in favor of the Indians and, thus, against the authority of the state to exercise any jurisdiction. *Barona Group,* 694 F.2d at 1190. The historical federal concern over Indian sovereignty requires this court to resolve any doubts against the exercise of state jurisdiction. *Confederated Tribes,* 938 F.2d at 149.

(2) Section 17(c)

The defendants next argue that Congress's failure to adopt the original section 17(c) indicates the states and not the federal government has the authority to investigate violations of IGRA. The original version of section 17(c) provided:

> The Attorney General of the United States is authorized to investigate activities associated with gaming

> authorized by this Act which may be a violation of federal law . . . The Attorney General is authorized to enforce such laws, or assist in the enforcement of such laws, upon evidence of violation as a matter of federal law, or upon the referral of information by the Commission . . . .

The version of section 17(c) adopted by Congress provides:

> The Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of federal law.

25 U.S.C. § 2715(c). Interpreting this language, the defendants argue the United States only has authority to investigate gaming activity authorized by IGRA, but does not have authority to investigate possible violations of IGRA. The defendants argue only the states have the authority to investigate possible violations of IGRA. This argument ignores the language of section 17(c) and common sense. The section authorizes the United States to investigate activities that "may be a violation of federal law." Further, there is no reason for Congress to limit the Attorney General's investigations to legitimate activity. Therefore, this argument is without merit.

(3) Law Governing Search Warrants

The defendants next argue the warrant was valid as a federal warrant under Federal Rule of Criminal Procedure 41 or as a state warrant. The warrant was not valid under Rule 41(a). This Rule allows a state court to issue a warrant for an alleged violation of federal law. However, the warrant may only be issued upon the request of a federal law enforcement officer or attorney. *United States v. Radlick,* 581 F.2d 225, 228 (9th Cir. 1978).[1] The defendants do not

[1] In *Radlick*, federal authorities participated in the search, but the search warrant did not comply with Rule 41(a). The court held that the

contend that the search warrants were issued at the request of any federal officer or attorney and, therefore, the search warrants were not valid federal search warrants.

The defendants also contend the warrant was valid as a state warrant and the evidence seized could be used in a subsequent federal prosecution. This is a more difficult argument. While there is plenty of case law discussing a state's authority to prosecute Indians, there is little case law discussing the state's ability to investigate alleged violations on Indian reservations. *See* Clinton, *Criminal Jurisdiction over Indian Lands,* 18 Ariz. L. Rev. 503, 572-74 (1976). Commentators suggest that the state should be without authority to investigate if the state is without jurisdiction to prosecute a violation. *Id.* at 574. This rule would be consistent with the strong federal policy of minimizing state interference in tribal life. *Id.* The issue is whether the state may issue and execute a warrant to search for and seize evidence if the state is without authority to prosecute because of exclusive federal jurisdiction and the state does not comply with Rule 41.

The Tenth Circuit has addressed the authority of the states to execute search warrants and to arrest individuals on reservations. In *United States v. Baker,* 894 F.2d 1144 (10th Cir. 1990), state authorities executed a state search warrant on a reservation. The evidence seized was later turned over to federal authorities for use in a federal prosecution. The Tenth Circuit concluded the evidence should have been suppressed because the search warrant was invalid. The search warrant was not valid as a federal warrant because not obtained pursuant to Rule 41. The search warrant also was not valid as a state warrant because the state had no jurisdiction over the reservation to enforce its laws, including

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evidence could be suppressed in a subsequent federal prosecution if the federal authorities had deliberately disregarded the requirements of Rule 41.

the execution of a search warrant, unless Congress consented to the state's jurisdiction. The defendants may seek to distinguish this case because the state, Colorado, had not received general criminal jurisdiction under section 1162, while California has received such jurisdiction. California, however, has no jurisdiction to enforce its gaming laws on the reservations under section 1162. *Cabazon,* 480 U.S. 202. Therefore, under *Baker,* it would appear the search warrant was invalid because California does not have the authority to enforce its gaming laws on the reservation under section 1162 and, thus, did not have the authority to search for evidence that may indicate a violation of its gaming laws.

A second case, *Ross v. Neff,* 905 F.2d 1349 (10th Cir. 1990), involved an arrest on Indian lands. The Tenth Circuit held the arrest was illegal because, again, the state was without jurisdiction to enforce its laws on the Indian lands.

Further, under general principles of search and seizure, "when a judicial authority . . . issues a search warrant, . . . it is presumed that the alleged offense . . . is within the limits of the issuing authority." Varon, Searches, Seizures and Immunities 408 (2d 1974).

> The majority view is that jurisdiction is necessary to the protection of the constitutional rights of the individual. The decisions uniformly hold that an issuing authority can only take cognizance of offenses that are within the purview of his authority . . . . The lack of jurisdiction by the issuing authority to issue a search warrant is not to be considered as a mere technicality

Id. at 409. As a general principle, a judicial officer's writ cannot run outside the officer's jurisdiction. *See United States v. Strother,* 578 F.2d 397 (D.C. Cir. 1978). Thus, there is a strong indication that the warrants in the present

cases were invalid because the state court did not have the authority to issue the warrants.

It also appears that the sheriffs acted beyond their authority by executing the warrants on the reservations. California Penal Code § 830.1 defines the territorial limitations of peace officers, including sheriffs and their deputies, in enforcing the law. The peace officers's authority extends to "any public offense . . . within the political subdivision which employs" the sheriff. If the sheriff acts outside this territorial jurisdiction, the sheriff has no law enforcement powers other than those that any private citizen would have. *People v. Pina,* 72 Cal.App.3d Supp. 35, 39 (1977). The reservations at issue certainly were not within the political subdivision which employed the sheriff deputies. It would appear, therefore, that the sheriff deputies acted beyond their authority by executing the search warrants on the reservations.

(4) Adequate Remedy at Law

Finally, the defendants argue the plaintiffs are not entitled to a preliminary injunction because the plaintiffs have an adequate remedy at law. The defendants contend the plaintiffs should seek the return of their devices through California Penal Code § 335a. This section, however, does not provide a remedy for the plaintiffs. The section merely states that the superior court shall have jurisdiction over any actions to recover seized devices allegedly in violation of California's laws governing slot machines. Further, a central issue in this case is whether the state courts have jurisdiction over Indian gaming and, thus, a state court may not be the appropriate forum.

(2) DISTRICT ATTORNEY

The District Attorney and the State Attorney General as amicus both argue that the District Attorney has the author-

ity to criminally prosecute violations of California's gambling laws as incorporated under IGRA, even in the absence of a tribal-state compact consenting to state jurisdiction. The District Attorney and the State Attorney General make this argument notwithstanding section 1166's express language. Section 1166(d) provides that:

> The United States shall have *exclusive jurisdiction* over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Trial-State compact . . . has consented to the transfer to the state of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

This defendant contends that section 1166(d) did not preempt or repeal the grant of general criminal jurisdiction under section 1162. The defendant's first error may be the assumption that the State has jurisdiction to enforce its gambling laws on the Indian reservations under section 1162. As discussed above, the Supreme Court in *Cabazon* concluded California's gambling laws were civil/regulatory and, thus, unenforceable on Indian lands under section 1162.

Even assuming, however, that California has the authority to enforce its gambling laws under section 1162, the defendant's argument that it has authority notwithstanding section 1166(d) is without merit. The defendant first contends that the appropriate analysis is the more stringent test of repeal by implication rather than preemption. Even assuming the test is repeal by implication, the specific grant of exclusive jurisdiction under section 1166(d) controls over the more general grant of state jurisdiction under section 1162.

It is a well-established rule of construction that a more specific statutory section governing jurisdiction controls over

a more general statutory section. *California v. Yeutter,* 887 F.2d 908, 911 (9th Cir. 1989). "The rule that a precisely drawn, detailed statute preempts more general remedies flows from the Congressional intent to carve out from the broader scheme a specific exception for this particular type of claim." *Id.* The defendant suggests that sections 1162 and 1166(d) can be harmonized by concluding that both state and federal authorities may prosecute violations of criminal/prohibitory laws under sections 1162 and 1166(d), but section 1166(d) limits the prosecution of civil/regulatory laws to the federal government. This construction would render superfluous Congress's express words and its comprehensive statutory scheme governing Indian gaming. A more appropriate and common-sense harmonization of the two statutory sections is simply that the state retains criminal jurisdiction under section 1162 to prosecute violations of all criminal/prohibitory laws other than those relating to gambling. Thus, pursuant to section 1162, the state has the authority to criminally prosecute homicides, drug offenses, and a variety of other criminal offenses. However, only the United States has jurisdiction to prosecute violations of the state's gambling laws.

The defendant's argument also ignores other well-established principles of statutory construction. First, the starting point of analysis is not the assumption that the state has jurisdiction, but rather that the state is without jurisdiction over the reservation. *Confederated Tribes,* 938 F.2d at 149's *Barona Group v. Duffy,* 694 F.2d 1185, 1190 (9th Cir. 1982). Historically, state jurisdiction over reservations has been strongly disfavored in order to protect Indian sovereignty from state interference. Second, any ambiguities in the statutory sections should be resolved in favor of the Indians and, thus, against the authority of the state to exercise jurisdiction. *Barona Group,* 694 F.2d at 1190. Third, this court is obligated to give ordinary meaning to the words chosen by Congress. *Yeutter,* 887 F.2d at 911. The

court must assume that when Congress chose to use the words "exclusive jurisdiction," Congress meant exactly that. Therefore, Congress did not intend to confer concurrent state jurisdiction by stating that the United States has "exclusive jurisdiction" over criminal prosecutions of offenses under the IGRA. The plaintiffs, therefore, have presented a strong showing that the District Attorney does not have authority to criminally prosecute alleged violations of IGRA.

III. IRREPARABLE HARM

The plaintiffs also have presented a strong showing of irreparable harm if a preliminary injunction is not issued. All three Bands have members facing criminal prosecution by the District Attorney's office. Further, the removal of the devices has deprived the tribes of income necessary to provide basic governmental services and to provide employment to its members. The Viejas Band alleges that it was forced to lay off 142 persons after the devices were seized, and the loss of revenues forced a cancellation of the Band's funding for members to complete their G.E.D. requirements. The Barona Band alleges it may be forced to eliminate a number of programs, such as scholarships, nutrition instruction, maintenance of water systems, and others, because these programs were dependent on revenue from the seized devices and the Gaming Center. The Sycuan Band as well has shown that a number of its basic governmental service programs are dependent on revenue from the seized devices and the Gaming Center. In sum, therefore, the plaintiffs have presented a very strong showing of irreparable harm in the absence of a preliminary injunction.

The defendants also argue that, according to *Lac du Flambeau Band v. Wisconsin,* 743 F.Supp. 645 (W.D. Wis. 1990), the plaintiffs will not suffer irreparable harm because the plaintiffs can avoid future criminal investigations and

prosecutions by not offering Class III gaming. This case is distinguishable. In *Lac du Flambeau,* there was no dispute over the classification of the devices as Class III. In concluding the plaintiffs could avoid future harm by not possessing Class III devices, the court distinguished a situation in which there is a risk of criminal prosecution because of a lack of clear standards governing the plaintiff's conduct. In the present case, however, the classification of the devices is hotly disputed and the line between Class II and Class III devices is not presently clearly defined.

IV. PUBLIC INTEREST

The public interest also is served by restraining the defendants from destroying the machines, from continuing with or commencing criminal prosecutions, and from reentering the reservations to search for or seize evidence in the absence of cross-designation or compliance with Federal Rule of Criminal Procedure Rule 41. Congress enacted the IGRA to provide a source of revenue for Indian reservations in order for the tribes to support and maintain their governments and sovereignty. The public interest is not served in any way by the defendants' destruction of the devices prior to trial, by the execution of search warrants not in compliance with Rule 41 or absent cross-designation, or by the continuance of criminal prosecutions when there is a strong showing that the state is without authority to engage in these activities.

V. ORDER

The plaintiffs have presented a strong showing that the defendants were without authority to search for and seize the gaming devices or to criminally prosecute alleged violations of IGRA. Therefore, the plaintiffs have made a sufficient showing to warrant a preliminary injunction restraining the defendants from destroying the devices and from commencing or continuing criminal prosecutions for alleged

violations of IGRA. The plaintiffs have also made a sufficient showing to warrant a preliminary injunction restraining the defendants from reentering the reservations to search for or seize evidence relating to alleged violations of California's gaming laws, absent cross-designation from the appropriate federal authorities or compliance with Federal Rule of Criminal Procedure 41.

This court, however, is not inclined to grant a preliminary injunction pending trial which would require the return of the devices. Although technological aids to Class II games are still considered permissible Class II games, electronic or electromechanical facsimiles of slot machines are Class III devices, prohibited in the absence of a tribal state compact. 25 U.S.C. § 2703(7)(A)(i), (7)(B)(ii). The plaintiffs have not made a sufficient showing that the devices are technological aids to the game of pull-tab rather than electronic facsimiles of slot machines. Therefore, the plaintiffs' request for return of the devices is denied at this time.

DATED: December 9, 1991

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

vs.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego; and EDWIN L. MILLER, JR., individually and as District Attorney of San Diego County,
Defendants.

CASE NO. 91-1648 H (BTM)

BARONA BAND OF MISSION INDIANS, a/k/a BARONA GROUP OF THE CAPTAIN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe, and VIEJAS BAND OF MISSION INDIANS, a/k/a VIEJAS GROUP OF THE CAPTIAN GRANDE BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,
Plaintiffs.

vs.

JIM ROACHE, individually and in his official capacity as Sheriff of the County of San Diego; DAN PAPP, individually and in his official capacity as a Deputy Sheriff of the County of San Diego; THE COUNTY OF SAN DIEGO, a political subdivision of the State of California, and EDWIN L. MILLER, JR., individually and in his official capacity as District Attorney of the County of San Diego,
Defendants.

CASE NO. 91-1669 H (BTM)

ORDER OF PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiffs' motion for a preliminary injunction. This court has considered the verified complaint, the affidavits submitted in support of said motion are in opposition thereto, and has heard oral evidence in open court. The court's findings of facts and conclusions of law are attached hereto in the Memorandum Decision Granting in Part and Denying in Part the Plaintiffs' Request for a Preliminary Injunction, and are hereby incorporated into this Order. It appearing to the court after due deliberation that the plaintiffs' have shown a likelihood of success on the merits and that they will suffer irreparable harm in the absence of a preliminary injunction,

IT IS ORDERED that the defendants, their officers, agents, employees, and all those in active concert or participation with the defendants or them are hereby restrained and enjoined pending trial on the merits from:

1. Arresting persons for alleged violations of the State of California gambling laws on the Sycuan Indian Reservation, the Barona Indian Reservation, and the Viejas Indian Reservation, located on Indian lands in San Diego County, California;

2. Searching for or seizing gaming-related property used in connection with the operation of the Sycuan Gaming Center, the Barona Gaming Center, and the Viejas Gaming Center, located on Indian lands in San Diego County, which are allegedly in violation of California's gambling laws, unless the warrant complies with Federal Rule of Criminal Procedure 41 or is pursuant to cross-designation from the appropriate federal authorities;

3. Implementing or continuing with criminal prosecution against any persons for alleged violation of California gambling laws related to the Sycuan Gaming Center, the Barona

Gaming Center, or the Viejas Gaming Center, located on Indian lands in San Diego County;

4. Destroying, mishandling, altering or removing without prior court approval any gaming-related property previously seized by defendants from the Sycuan Indian Reservation, the Barona Indian Reservation, or the Viejas Indian Reservation, located on Indian lands in San Diego County.

Each plaintiff has previously posted a bond in the amount of $250.00. The court finds this amount to be sufficient for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined. This, conditioned on the plaintiffs' refraining from placing any new machines arguably Class III devices pending the trial of this matter.

DATED: December 9, 1991

MARILYN L. HUFF
Marilyn L. Huff, Judge
United States District Court

APPENDIX K

BARBARA E. KARSHMER, INC. (59578)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

v.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; and DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego,
Defendants.

NO. 91-1648-H (BTM)

DECLARATION OF DANIEL J. TUCKER IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

DANIEL J. TUCKER declares as follows:

1. I am a member of the Sycuan Band of Mission Indians. I have lived on the Sycuan Reservation for most of my life, except for times when there was no adequate housing available on the Reservation. At present, I am the duly-elected Chairperson of the Sycuan Band of Mission Indians. Between 1982 and my election as Chairperson in November, 1990, I served as the Band's duly-elected Vice-

Chairperson. I make this declaration based upon my personal knowledge, the official records of the Sycuan Band and the Sycuan Gaming Center, all of which are available to me as Chairperson.

2. The Sycuan Reservation was established by a Presidential Executive Order dated December 27, 1875, and the trust patent for the Reservation was issued under the Mission Indian Relief Act on February 18, 1892. The Reservation consists of 640 acres of land in southeastern San Diego County, California, outside the City of El Cajon. The Band is listed in the Federal Register as a Tribal entity with which the United States maintains government-to-government relations.

3. The Band is organized under Articles of Association approved by an authorized representative of the Secretary of the Interior on August 17, 1972.

4. Until the area surrounding El Cajon began a period of rapid growth about ten years ago, the Reservation was located in a rural, relatively isolated area. There were virtually no businesses or other places of employment in the vicinity of the Reservation, and even the agricultural activity in the area was scattered and small-scale.

5. The Sycuan Reservation does not have any significant natural resources such as mineral deposits, timber, or even particularly fertile soil which could be exploited or developed by the Band or its members for the purposes of generating income or employment. Much of the Reservation consists of brush-covered hillsides which are not suited to any agricultural or commercial activity, and the Reservation did not have a water system capable of supplying enough water of suitable quantity or quality to meet even basic needs.

6. Of the Reservation's 640 acres, 260.46 acres have been allotted to individuals, and are held in trust for them by the United States. The remaining 379.54 acres are held in trust for the Band by the United States. Only about 340 acres of the Reservation are suitable for any form of development or other economically feasible beneficial use. Of those lands, only a small portion is suitable for commercial development, and most of that area already has been put to use in connection with the Bands' gaming facilities. The remainder of the Reservation's Tribal lands on which commercial development is not economically feasible have been reserved for the future residential needs of Tribal members. If such lands were not reserved for future residential use, there would be no way to accommodate future generations of Tribal members on the Reservation.

7. For much of the Reservation's history, the people of the Reservation have endured a standard of living far below their non-Indian neighbors. There was almost no gainful employment on or near the Reservation. Much of the Reservation's housing stock was poorly constructed decades before, and long ago had become seriously deficient. Sanitation conditions were grossly substandard, and the lack of a reliable supply of potable water was a constant problem. Because of a lack of employment and housing on the Reservation, living on the Reservation meant continuing hardship, dependency and deprivation. As a result, the Band faced the very real prospect that the Reservation community would disintegrate as elders passed away and younger members moved away from the Reservation to seek better lives elsewhere.

8. Before the Band established its gaming enterprise in 1983, the Band had no way to generate revenues with which to operate its government or provide any basic governmental services to Tribal members and other Reservation residents. The few federal services which were available tended to be

inadequately funded or inconsistently provided, and San Diego County provided virtually no services on the Reservation. As a result, Reservation residents were deprived of most of the governmental services and amenities which routinely are available in non-Indian communities.

9. In the early 1980's, the Band learned that some federal courts had held that Tribes could operate Bingo games without regard to the limitations which State law imposed on Bingo games run by churches and other non-profit organizations. The Band also learned that some Tribes had established Tribal Bingo enterprises which were proving successful at generating revenues for Tribal governments and providing meaningful on-Reservation employment for Tribal members.

10. The Sycuan Band determined that establishment of a high-stakes Bingo enterprise would provide the Band with the funds which it needed to run its government and serve its members, and also to provide decent jobs for its members and their families. However, the Band did not have the financial resources necessary to construct a suitable facility or to start and support the business, and no financial institution could be found which would loan the necessary funds directly to the Band. Therefore, the Band entered into an agreement with a management company which could provide or obtain the necessary financing for the construction of the facility and starting up the business, and the managerial expertise to operate the business until the Band had obtained the requisite experience.

11. The Sycuan Band's Bingo facility was constructed in the fall of 1983 at a cost to the Band of about $1,000,000. The Band's Bingo enterprise was modestly successful, enabling the Band to repay the costs of construction and startup, provide employment for many Tribal members, and begin providing a variety of governmental services to its members. However, the Band's enterprise faced competition

from other Indian Bingo enterprises in San Diego and Riverside Counties, and also non-Indian gaming establishments and forms of gaming, including cardrooms in surrounding cities.

12. To begin to diversify in order to meet strong competition, in 1987 the Band established a small card room in a preexisting Tribal building, offering patrons the opportunity to play card games not prohibited by California Penal Code Sec. 330.

13. In December, 1987, a dispute between the Band and its management company culminated with the Band assuming full and direct control of its Bingo Enterprise (the cardroom was operated as a separate entity and by December, 1987, the Band already had assumed full and direct control of that facility).

14. By early 1989, the Band had determined that its card room should be expanded and consolidated with its Bingo enterprise in order to make the Band's facility more attractive and successful in the increasingly crowded and competitive California gaming industry. This consolidation required major renovation and enlargement of the Bingo facility. The Band also determined that in order to meet the additional competition of the new California State Lottery, the Bingo and card enterprises should be enhanced by the addition of a simulcast wagering facility and restaurant-quality food services, so that the Band could offer its patrons a combination of gaming and dining experiences unique in California.

15. While planning for the expansion of its gaming facilities, the Band also was engaged in a variety of vital programs to improve the quality of life on the Reservation. Using revenues from gaming, the Band began an extensive program of housing construction for Tribal members, established a Tribal health clinic, created a public safety department with 24-hour patrol personnel and fire and ambulance

services, established programs of educational assistance, and otherwise provided for the needs of its members.

16. Once again, the Band tried and failed to locate a commercial lender willing to finance the expansion of the Band's gaming facility. Therefore, the Band once again retained the services of a management company to gain access to the necessary financing, as well as to provide additional management expertise for the operation of the expanded and diversified gaming facility.

17. In 1989, at a cost to the Band of approximately $3.5 million, the Band renovated its Bingo facility and expanded the facility to accommodate a large card room and restaurant. The Band also made plans to further expand the facility to accommodate a simulcast wagering facility.

18. In 1990, the Band, using financing obtained with the assistance/guarantee of its management company, expended an additional $600,000 to add a simulcast wagering facility to its gaming center.

19. The Band's cash flow from its gaming activities has not been sufficient to pay all of the costs of improving its facilities in a lump sum while also funding all of the operations and programs of the Band's government. So as to be able to continue to meet the needs of its members even as it has expanded and improved its gaming facilities, the Band has borrowed the funds with which to pay for that expansion and improvement, and must repay those funds with interest. Thus, the less revenue the Band receives from its gaming activities, the longer it takes the Band to repay its debts incurred in connection with those activities, the more it costs the Band in interest on those debts and the less money is available for the Band to expend on Tribal programs and other Tribal initiatives to attain economic self-sufficiency.

20. The Band has received 2.33% of the total handle at its simulcast wagering facility under the Compact between

the Band and the State of California. License fees in excess of 3% of the total handle at the Band's simulcast wagering facility have been deducted and distributed to the State of California. Although the Band is a government, rather than a private, for profit business entity, the State has not made any funds available to the Band for the repayment of debts or other costs incurred in the course of building and thereafter operating the Band's simulcast wagering facility. The Band presently is litigating the State's right to collect its license fee on the Band's simulcast facility.

21. The Band has determined that its long-term economic growth and security depends upon avoidance of permanent reliance upon gaming as its only source of income. The Band also has determined that the expansion of its existing land base will be necessary both to accommodate future growth in its membership, and to develop a well-diversified Reservation economy. Therefore, the Band actively is pursuing a number of initiatives to acquire additional land and to develop that land in ways which will create a variety of non-gaming sources of revenue and employment, as well as providing room for Tribal population growth. Revenues from gaming will be indispensable to the success of these initiatives.

22. The Band has enacted extensive ordinances to authorize and regulate the establishment and operation of its gaming activities, including its Bingo, cardroom and simulcast wagering enterprises. In addition to regulating those activities, those Ordinances require that all persons employed on the Reservation obtain and carry on their persons Tribal work permits. The Band strictly enforces its gaming ordinances and regulations to ensure both the legality and honestly of gaming activity and the health, safety and comfort of all persons in the facility.

23. Other than to enter into a Tribal-State compact governing the operation of the Band's simulcast wagering

facility, the Band never has consented to the conferral upon the State of California of any jurisdiction to directly apply and enforce the gambling laws of the State of California or any of its subdivisions on the Sycuan Reservation.

24. Early in 1991, the Band became aware that a number of other Indian Tribes had installed various electronic devices in their gaming facilities, and that these devices appeared to be both popular and profitable. However, the Band was concerned that at least some of these devices might constitute Class III gaming devices for which a compact might be required, and did not wish to engage in any Class III gaming activity in the absence of a compact.

25. While investigating the nature and legality of various gaming devices, the Band became aware of the Video Autotab Model 101 electronic pulltab dispenser. The Band was presented with evidence that the California distributor of those dispensers had been licensed by the County of Los Angeles to supply the dispensers to non-Indian bingo facilities in that County, and that the manner in which the dispensers are designed and operated makes them electronic or computer aids to the Class II game of pulltab, rather than Class III gaming devices. Copies of the proceedings before the Los Angeles County Business Licensing Commission which were supplied to the Band are attached hereto as Exhibit A.

26. To ensure that the installation of these dispensers would not violate applicable laws, the Band, through its legal counsel, informed the United States Attorney for the Southern District of California of its plans to install the dispensers, and requested the views of the Justice Department upon the legality of the dispensers. Copies of that correspondence are attached hereto as Exhibits B-C.

27. Under an agreement with Video Autotab, Inc. to lease Model 101 electronic pulltab dispensers from that

company for use in the Band's Gaming Center, by August, 1991 the Band had placed approximately 50 of the dispensers into operation at the Gaming Center; two dispensers have been kept on hand as spares.

28. The Band received a copy of California Attorney General Lungren's October 8, 1991 memorandum regarding the State's claim of jurisdiction over Indian gaming shortly after it was issued. A copy of this letter is attached hereto as Exhibit D. Through its legal counsel, the Band expressed its disagreement with Mr. Lungren's position, and expressed the hope that this dispute could be resolved through negotiations conducted in an atmosphere of mutual respect, rather than in a State-initiated confrontational process. A copy of the Band's attorney's letter to Mr. Lungren, a copy of which was sent to Sheriff Roache, is attached hereto as Exhibit E. The band's legal counsel communicated with Rick Pinckard, a legal advisor to Sheriff Roache, and received a letter expressing an interest in further communication on this issue. A true copy of that letter is attached hereto as Exhibit F.

29. On November 15, 1991, the Band's business manager, James Trant, received a notice from the San Diego County District Attorney that he has been cited for violation of California Penal Code §330.1, and that he is to be arraigned in the Municipal Court in San Diego at 12:30 p.m. on November 21, 1991, in case number M635264.

30. The County's invasion of the Reservation to enforce State gaming laws has had an extremely costly impact upon the Band's Gaming Center, and constitutes a gross and disrespectful violation of the Band's rights as a sovereign Tribal government, as well as a deprivation of the Band's right under the Indian Gaming Regulatory Act to engage in Class II gaming without State interference. The Sheriff's unilateral determination of what is Class II gaming, and his seizure of Tribal property and prosecution of Tribal officials

based upon that determination poses a direct threat to the Band's ability to operate its Gaming Center for the purpose of raising revenues which it needs to operate its government and the programs and services which that government provides to the Reservation community.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 15, 1991, at El Cajon, California.

DANIEL J. TUCKER
Daniel J. Tucker

APPENDIX L

BARBARA E. KARSHMER, INC. (59578)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SYCUAN BAND OF MISSION INDIANS,
Plaintiff,

v.

JIM ROACHE, individually and as Sheriff of San Diego County; THE COUNTY OF SAN DIEGO; and DAN PAPP, individually and as a Deputy Sheriff of the County of San Diego,
Defendants.

NO.

DECLARATION OF HAROLD S. HENRY IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

HAROLD S. HENRY declares as follows:

1. I am the founder of, a principal in and software engineer at Strange Industries, Inc., a Washington corporation which I founded in 1988 as an umbrella for software development. At present, Strange Industries, Inc. is almost exclusively devoted to developing and supporting technology

associated with the Autotab Model 101 electronic pulltab dispenser, which is manufactured by Autotab, Inc. and distributed in California by Video Autotab, Inc. A more detailed description of my academic background, degrees and work history is attached hereto as Exhibit A.

2. The game of pulltab is a form of bingo. The essence of the game of pulltab is that the player purchases what the player hopes will be a winning ticket from a finite pool of tickets containing a fixed, predetermined and known number of winning tickets at fixed, predetermined and known prize levels, and then reveals concealed numbers or other symbols on the ticket to determine whether the combination of numbers or other symbols entitles the player to claim a particular prize. The finite pool of tickets available to be played in each game is reduced with each additional ticket sale, such that when all of the game tickets have been sold, all of the winning tickets will have been distributed.

3. As explained on Exhibit A, I was a co-founder of and software engineer at Haltbar Technologies, Inc., another Washington corporation. Haltbar Technologies, Inc. was retained by Autotab, Inc. to develop the Autotab Model 101 electronic pulltab dispenser, and while at Haltbar Technologies, Inc. I began to develop the software for the Model 101 dispenser.

4. The assignment which Autotab, Inc. gave Haltbar Technologies, Inc. was to develop an electronic pulltab dispenser which would allow the game of pulltab to be played in exactly the same way the game is played with paper pulltabs, but in a way which would produce less paper waste, save labor costs, offer greater security against skimming, clerical errors, theft or miscounting of tickets or money by employees of establishments operating pulltab games and cheating or counterfeiting by pulltab players, and provide the operator and regulatory authorities with a com-

plete, permanent, unalterable and readily available accounting of the dispenser's operation and revenues.

5. At Haltbar Technologies, Inc., I had primary responsibility for developing the software for the Model 101 electronic pulltab dispenser. When the development contract was transferred to Strange Industries, Inc., I continued to have that responsibility, and proceeded to develop the software which operates the dispenser. John Hoyt, also of Strange Industries, developed the hardware for the dispenser.

6. In developing the software for the Model 101 dispenser, I utilized the following game parameters:

A. Every game has a beginning and an end;

B. Every game is manifestly distinct from all other games, such that each game can be assigned its own serial number, and the results of its play can be tallied, if so desired;

C. A game consists of a predetermined number of tickets, each of which constitutes one play or chance of winning;

D. Every ticket is sold at the same nominal price;

E. Every ticket falls into one of a predetermined number of prize categories, generally associated with specific combinations of graphical symbols (obviously, one of those categories contains tickets which win no prize), and each prize category contains a predetermined number of tickets, such that the total number and configuration of prizes in a game is completely and unambiguously predetermined before the start of play;

F. When a ticket is purchased and played, both the number of tickets in the game and the number of tickets in the corresponding prize category are diminished by one. When all tickets in a prize category have

been purchased, that category is exhausted, and no more prizes of that type can be won. When all tickets in the game have been purchased, the game cannot continue and must be closed;

G. Play of the ticket consists of opening the ticket to reveal its prize category. To provide the suspense which some players enjoy experiencing while playing the game, the opening process should be designed to enable it to occur in more than one step, if the player so desires.

7. The Video Autotab Model 101 electronic pulltab dispenser (hereinafter "dispenser") consists of an electrically-powered computer linked to a video monitor, a printer which prints and dispenses winning tickets at the request of the player and audit information at the request of the operator, and a locked receptacle into which money is deposited by players to activate the use of the dispenser. The dispenser enables the player to play the game of pulltab by purchasing pulltabs of a game theme selected by the player from a finite and known quantity of pulltabs electronically stored for that game in cartridges which are inserted into the dispenser by the operator. Each cartridge contains a finite and predetermined number of pulltabs, of which a predetermined number are winning combinations at various predetermined prize levels. Neither the pulltabs stored in the cartridges nor the information recorded about each use of the dispenser can be altered by the operator or the player, and the number of pulltabs stored for each game is displayed on the video screen. Each purchase of a pulltab from the dispenser removes that pulltab from the pool of tickets remaining for play in the cartridge in which it was stored, and once all of the pulltabs stored in a particular game on a cartridge have been played, all of the winning pulltabs stored in that game also will have dispensed and the game must be closed; when all of the games on the cartridge have been

closed, the entire cartridge must be replaced with another cartridge containing new pulltabs.

8. The Model 101 dispenser is housed in a floor-standing cabinet for stand-up use by one person at a time. A 19-inch color video screen initially displays the available games, as well as information about the number of tickets in each game, the number of winning tickets in each game, and the number of winning tickets at each prize level. The main processor board of the unit is contained in a locked steel compartment in the machine which is accessible only to service personnel. Encryption and decryption of the main board is handled in a hardware implementation that would be extremely difficult to examine or tamper with, while frequent cross-checking makes tampering with data on any level unpredictably difficult. Any security violations are recorded in the dispenser's log and audit areas.

9. The pulltab games and tickets dispensed by the Model 101 dispenser are electronically stored in EPROM chips housed in cartridges which plug into the dispenser within a locked compartment. The cartridges are internally and externally serialized epoxy sealed and fully encrypted. When fresh, each cartridge contains 24,000 tickets, evenly divided into one or more identical games. In the cartridge are contained the graphical symbols making up the combinations and a complete specification of the game, including the price of tickets, the number of tickets, the number and amount of all prizes and combinations of prizes, and a variety of such potential limits and rules of play as might be required by different jurisdictions.

10. Like a box or deal of paper pulltab tickets, the cartridge holds only data. It contains no computer code, and thus cannot affect the play of the game in any way not predetermined and controlled by the design of the system.

11. To make a game available for play, the operator of the dispenser must use a key or password to explicitly open the game. At that point, the Model 101 dispenser loads the game from the cartridge, "shuffles" the tickets, and sets up the necessary data space to keep track of the game. It also records in the cartridge how and when the game was opened.

12. The operator of a pulltab game using paper pulltabs attempts to ensure the fair and thus random distribution of tickets by mixing up the box of paper tickets received from the manufacturer. However, other than by relying upon the skill and honesty of employees, the operator of a pulltab game using paper tickets has no way to absolutely ensure that the box of tickets is fully shuffled, or that employees have not attempted to locate and remove winning tickets before the game is made available for play.

13. To ensure the fair distribution of game tickets on the Model 101 dispenser, when a player purchases a game ticket, the Model 101 dispenser uses a "random number generator" to select one of the tickets remaining in the game, thereby decreasing by one both the total number of tickets remaining in the game and also the number of tickets remaining in one of the prize categories. The fluctuation of odds as tickets are played thus is exactly equivalent to that which occurs in other embodiments of the games, such as when paper tickets are drawn from a "fishbowl" in a tavern or bingo hall, or sold by a floor clerk.

14. As the play of the game proceeds, the Model 101 dispenser records the time and date of significant events associated with play (*e.g.*, significant winning tickets) on the cartridge, and also logs and prints on continuous feed paper these data, along with every winning ticket, every game closure, every cash transaction and every system error. In addition to the paper log, the model 101 maintains audit information elsewhere in the dispenser. Gross game activity

is recorded on non-resettable mechanical "hard counters" over the life of the dispenser. It also maintains electronically on the main board detailed information about the games currently available for play, together with summary information about the last 1,000 games played in the dispenser, a machine access, cash and security log covering the same period, and general accounting information for the last five years of operation. It also records in each game cartridge a detailed log of the play of games contained in that cartridge, allowing the dispensers and cartridges to be audited separately. Finally, audit reports designed to meet the needs of auditors and regulators without compromising games in play are accessible at any time upon entry of appropriate password sequences. The dispenser records and reports information about the dispenser's activity on daily, week-to-date, month-to-date, quarterly, year-to-date and cumulative-since-installation bases. The computer also records and reports complete audit information about each game contained in a cartridge; *i.e.,* the location and identification number of the dispenser, the name of the game, the date and time of the audit request, gross and net receipts, total number of pulltabs in the cartridge, tickets played, tickets remaining, winning tickets dispensed, prizes won, prize money won and system errors. At no time does control over the computer's operation pass from the computer to the cartridge.

15. Once a player has selected a game and purchased a pulltab, the ticket being played is displayed on the screen together with the game flare (the flare is updated after each play). The player may select which individual window to pull, or s/he can choose to pull all the windows on the ticket at once. A winning combination causes a colorful display accompanied by sound effects. If the prize is less than a designated amount, the player may choose to apply it for the purchase of additional plays or to be paid out, but all larger prizes must be paid out. Prizes to be paid out are issued as

winning tickets printed on special patterned security paper and dispensed from the front of the machine. On the front of each winning ticket, the Model 101 prints the name and location of the operator, the serial number of the dispenser being used, the dollar amount of the prize (in words as well as numbers), the date and time of win, the name and serial number of the game being played, and a validation code. On the back of the ticket is preprinted a form for the name, address and driver's license of the winner, and a signature line.

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge, and that this declaration was executed at Seattle, Washington on November 14, 1991.

HAROLD S. HENRY

Harold S. Henry

EXHIBIT A

Harold S. Henry *Vita*

Work History

General: For the last ten years I have been working primarily for small companies in which I have been a principal. I have had responsibility for accounting, financial planning, general management, new product development, long-term planning, systems development for internal use, human resources development and training. The primary focus of my daily work, and my primary interest, has been software engineering. I began programming in the early 1980s in Basic, then switched to C and assembler around 1984. Since late 1989, I have been solely responsible for designing and writing the BIOS and operating software for the Autotab Model 101, based around the Intel 80186 processor.

1991 — Strange Industries, Inc. Founder, software engineer. I founded Strange Industries in 1988 as an umbrella for software development (at that time I planned to introduce an accounting system to operate under OS/2 and have purchased the SDK). At present, the company is almost exclusively devoted to developing and supporting technology associated with the Autotab Model 101.

1987-1990 — Haltbar Technologies, Inc. Co-founder, software engineer. Haltbar is a small digital-electronics engineering and manufacturing firm located in Redmond, Washington. Founded in March of 1987 by myself and an associate, our 1994 sales were in the neighborhood of $1 million. Haltbar products include network interface boards, MIDI interfaces, dental diagnostic equipment, and a variety of other digital electronic equipment, all sold on an OEM basis. I have negotiated an agreement with one of the other Haltbar principals to sell out my interest in the company.

1985-1986 — Professional Computer Solutions, Inc. Co-founder, software engineer. At P.C.S., I worked at marketing computer hardware and services, providing hardware and software support, and I did a fair amount of contract programming in C. One major project from this period was a full-function, dual-column word processor intended for video script writing.

1983-1985 — Ixion, Inc. Co-founder, software engineer. Ixion was intended to commercialize the enormous educational power of interactive videodisc technology. The company was somewhat ahead of its time in its "multi-media" vision, and we anticipated a lot of the potential which is only now being realized by affordable hardware.

1982-1983 — Bio Technica International, Inc. CFO, Treasurer. BTI is a genetic engineering company founded in 1981 in Cambridge, Mass. by a group of Harvard and MIT scientists. When I joined the company, it had fewer than ? employees; when I left to create Ixion, it had over 60, and an annual budget of over $? million. At BTI, I established, managed and computerized accounting, budgeting and reporting systems, arranged financing for the purchase of facilities, helped to negotiate and oversee construction of $2-million laboratories, and had significant responsibility for arranging the company's successful $7 million IPO with D.H.Blair. I resigned from Bio on very good terms, because I wanted to get out of financial management into a more hands-on role.

1980 — Coopers & Lybrand. Audit sta

Education

General: Languages: Polish, Italian, French, Russian, Latin, some German.

1978-1979 — Columbia University, M.B.A. Concentration in Finance and Accounting, along with a heavy empha-

sis on quantitative methods, operations research, and optimization. Early involvement in data compression and pattern-recognition implications of fractal theory.

1971-1978 — Columbia University, M.A., M.Phil. in Eastern European History.

1967-1971 — Harvard University, B.A. in Russian History.

Personal: Born: 10/29/48; married, 2 children. References available on request.

APPENDIX M

INFINITY GROUP, INC.; NEW MEXICO AMATEUR HOCKEY ASSOCIATION; SCHOLASTIC, INC.; NEW ERA EDUCATION, INC.; EUGENE P. LONG, DISABLED AMERICAN VETERANS CHAPTER 32; KIDDIE KOLLEGE OF ALBUQUERQUE, INC.; THE ALBUQUERQUE SERTOMA CLUB, INC.; DISABLED AMERICAN VETERANS, DEPARTMENT OF NEW MEXICO; SANDIA MOUNTAIN LIONS CLUB; AMERICAN LEGION POST 122; FAMILY ENRICHMENT CENTER; RIO GRANDE WRESTLING CLUB, INC.; ALBUQUERQUE SPEECH & HEARING; DEMOCRATIC PARTY OF BERNALILLO COUNTY; TELEPHONE PIONEERS OF AMERICA; AND QUANTUM CORPORATION,
Plaintiffs-Appellants,

v.

JERRY MANZAGOL, SUPERINTENDENT, REGULATION AND LICENSING DEPARTMENT OF THE STATE OF NEW MEXICO,
Defendant-Appellee.

No. 14929.
Court of Appeals of New Mexico.
Sept. 13, 1994.
Certiorari Denied Oct. 18, 1994.

After State Regulation and Licensing Department refused to allow installation of electronic pull tab games, distributors and operators of gaming devices sought declaratory judgment that games were permissible under Bingo and Raffle Act. The District Court, Bernalillo County, Susan M. Conway, D.J., denied complaint, and distributors and operators appealed. The Court of Appeals, Pickard, J., held that electronic games which included all elements of pull tab games as understood by legislature at time Bingo and Raffle Act was adopted were permissible under Act.

Reversed.

[1] GAMING k6
188k6
As allowed under Bingo and Raffle Act, game of pull tabs involves finite number of prize cards, and distribution of those prize cards through chance drawing by player. NMSA 1978, §§ 60-2B-1 to 60-2B-14.

[2] GAMING k6
188k6
Paper pull tab games as are presently played were contemplated by legislature as form of game of chance of raffles allowed under Bingo and Raffle Act. NMSA 1978, § 60-2B-8, subd. J.

[3] GAMING k6
188k6
Use of mechanical devices in operation of games of chance is generally allowed under Bingo and Raffle Act. NMSA 1978, §§ 60-2B-1 to 60-2B-14.

[4] GAMING k6
188k6
Electronic games which replicate all essential elements of pull tabs are "pull tabs" as that game was commonly known at time of adoption of Bingo and Raffle Act and are allowed under act. NMSA 1978, §§ 60-2B-1 to 60-2B-14.

See publication Words and Phrases for other judicial constructions and definitions.

[5] GAMING k6
188k6
Fact that electronic pull tab machines which otherwise were lawful pull tab games under Bingo and Raffle Act were found to be "glamorous" and "enticing" does not mean that machines were prohibited by Act; Act allows form of gambling commonly known as pull tabs, and glamorous and enticing version of game does not change its essential character. NMSA 1978, §§ 60-2B-1 to 60-2B-14.

[6] GAMING k6
188k6
Court did not defer to regulations of State Regulation and Licensing Department prohibiting electronic pull tab machines where it found that Bingo and Raffle Act unambiguously allowed games. NMSA 1978, §§ 60-2B-1 to 60-2B-14.

*524 John T. Porter, John T. Porter, P.A., Albuquerque, for plaintiffs-appellants.

Tom Udall, Atty. Gen., Joel Cruz-Esparza, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

PICKARD, Judge.

This case presents the sole issue of whether machines that electronically simulate the game of pull tabs are allowed by the Bingo and Raffle Act, NMSA 1978, §§ 60-2B-1 to -14 (Repl.Pamp.1991). We hold that the Act allows for the operation of such machines by those organizations covered by the Act.

BACKGROUND

The purpose of the Act, which was passed in 1981, "is to make lawful and regulate the conducting of certain games of chance by certain nonprofit organizations." Section 60-2B-2. A "game of chance" is defined by the Act as that specific kind of game of chance commonly known as bingo or lotto in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random and that specific kind of game of chance commonly known as raffles which is conducted by drawing for prizes or the allotment of prizes by chance or by the selling of shares, tickets or rights to participate in the game[.] Section 60-2B-3(M).

The State Regulation and Licensing Department is charged with the administration and regulation of the gaming activities allowed by the Act. Section 60-2B-4(A)(2). *525 The Department has issued regulations pertaining to the operation of "jar raffles " and "pull tabs" by those organizations covered by the Act. As it is currently played in New Mexico, the game of pull tabs involves a player randomly drawing a paper card from a finite number of winning and losing cards and physically pulling away tabs affixed to the card, thereby revealing a combination of numbers or symbols with which the player may win certain cash prizes. The Department's regulations define "jar raffles or pull tabs" as "printed tickets that have a pull tab or seal to be opened by the purchaser where a winning combination is printed on each ticket or on a separate card[.]" Definition of Bingo & Raffle Terms, N.M. Regulation & Licensing Dep't Reg. 2B-3(J) (March 21, 1984).

Plaintiff Infinity Group is a distributor of electronic gaming devices, Plaintiff Quantum Corporation is the landlord of buildings in which bingo and pull-tab games are conducted for non-profit organizations, and all other Plaintiffs are non-profit organizations licensed under the Act. Plaintiffs collectively wish to distribute, install, and operate three machines — the "Oasis," the "VLC," and the "Wildfire" — which electronically simulate the game of pull tabs. As with traditional paper pull tabs, Plaintiffs' machines randomly draw from a finite number of winning and losing chances, and gradually reveal the numbers or symbols which inform players whether they have won or lost. Unlike the traditional game, however, the "tabs" involved are not actual paper tabs but are instead simulations of paper tabs on a video screen. Consequently, Plaintiffs' machines do not allow for players physically to pull tabs off of a paper card but, again, simulate this action on the video screen instead. Plaintiffs' machines, therefore, do not conform to the Department's

regulation defining permissible pull tabs as printed tickets to be opened by the purchaser.

The Department refused to allow Plaintiffs to install and operate the machines. Plaintiffs filed a complaint asking for a judgment declaring that their electronic pull-tab games are permissible under the Act. In response, the Department relied upon its regulations defining permissible pull tabs. Following a bench trial, the district court found that, although the machines are a computerized form of the pull-tab game as it is currently played in New Mexico, and although the machines offer greater protection from abuse than paper pull tabs, the additional resources required to regulate the machines and the "glamorous and enticing" qualities of the machines were factors that the Department could have properly considered in disallowing these machines. The district court also found that the machines did not exist at the time the Act was passed. The district court then concluded that electronic pull-tab games are not authorized by the Act and are against public policy, and it denied Plaintiffs' complaint. Plaintiffs appeal, and we reverse.

DISCUSSION

Initially, the Department argues that this case turns on whether the regulations it promulgated under the Act were intended to regulate electronic pull-tab games. This argument, however, misapprehends the issue. The question in this case is what games the legislature, not the Department, intended the Department to regulate. See Chalamidas v. Environmental Improvement Div., 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App.1984) (agency cannot amend or enlarge its authority or modify the statutory provision creating it through rules and regulations).

[1][2] The Department next argues that, notwithstanding its regulations allowing paper pull-tab games, the language of the Act does not in fact allow for any type of pull-

tab game. It is true that the definition of "game of chance" does not expressly include the game of pull tabs. However, we have previously construed the Act's definition of "raffles," which is a "game of chance," as an allotment of prizes by chance accomplished through a drawing. See State ex rel. Rodriguez v. American Legion Post No. 99, 106 N.M. 784, 787, 750 P.2d 1110, 1113 (Ct.App.), cert. denied, 106 N.M. 588, 746 P.2d 1120 (1987), and cert. denied, 107 N.M. 16, 751 P.2d 700 (1988). The trial court's findings demonstrate that, as it is currently played in New Mexico, the game of pull tabs involves exactly these elements: 1) a finite number of prize cards; and 2) the distribution of those *526 prize cards through a chance drawing by a player. Further, we note that elsewhere the Act specifically provides that "[t]he aggregate amount of all prizes offered or given in all games played on a single occasion shall not exceed one thousand five hundred dollars ($1,500) which shall be exclusive of pull tabs." Section 60-2B- 8(J) (emphasis added). In sum, the fact that pull-tab games as played in New Mexico fit the Act's definition of "raffles," combined with the fact that "pull tabs" are specifically mentioned elsewhere in the Act, leads us to believe that at least the paper pull-tab games that are presently played were contemplated by the legislature as a form of the game of chance of raffles allowed under the Act.

[3] This brings us to the real question in this case, namely, whether electronic simulations of pull-tab games are allowed by the Act. There is nothing in the Act expressly prohibiting electronic versions of the game. Indeed, the Act refers to "equipment" to be used with respect to raffles, and defines such equipment as "implements, devices and machines designed, intended or used for the conduct of raffles and the identification of the winning number or unit and the ticket or other evidence or right to participate in raffles [.]" Section 60-2B-3(L) (emphasis added). It is therefore ap-

parent that mechanical devices are generally allowed under the Act.

We do note that the Act allows for that game of chance "commonly known as" raffles, and it is true that electronic pull-tab simulation machines did not exist at the time the Act was passed in 1981. Thus, a possible argument favoring the Department's construction is that electronic pull-tab games could not have been games "commonly known" at the time of enactment. We do not believe, however, that because only the paper form of the game was in existence in 1981, only the paper form is permissible under the Act. See generally *State ex rel. Udall v. Public Employees Retirement Bd.*, ___ N.M. ___, ___, 882 P.2d 548, 552-57 (Ct.App.1994) [(1994)] To begin with, we do not believe that the phrase "commonly known as" adds anything, including an element of ambiguity, to the Act, as that phrase appears to be boilerplate language regularly attached to statutes regulating games of chance. See, e.g., 25 U.S.C.A. § 2703(7)(A)(i) (Supp.Pamp.1994); Colo.Rev.Stat. §12-9-102(7) (1991); La.Rev.Stat.Ann. § 33:4861.4(A)(1) (West 1988); Mich.Comp.Laws Ann. § 432.102(1) (West Cum.Ann.Pocket Part 1994); N.J.Stat.Ann. § 5:8-25 (West 1988); N.Y.Gen.Mun.Law § 476(3) (Consol.1982); R.I.Gen.Laws § 11-19-30(e) (Cum.Supp.1993); S.C.Code Ann. § 12-21-3320(1) (Law. Co-op.Cum.Supp.1993); Tex.Rev.Civ.Stat.Ann. art.179d, § 2(2) (West Supp.Pamp.1994); Wis.Stat.Ann. § 565.01(6m)(b)(9) (West Spec.Pamp.1993). We are supported in our determination not to give persuasive weight to the phrase "commonly known as," inasmuch as the federal act, for example, groups "pull-tabs, lotto, punch boards, [and] tips jars" with games "commonly known as bingo." 25 U.S.C.A. § 2703(7)(A)(i)(III).

[4] Further, we do not believe that paper cards or any skill that might be associated with paper cards were so

important an element of the game in 1981 as to make Plaintiffs' machines violative of the Act. To be sure, actual cards handled by players, and skills associated therewith, may be an essential aspect of other games traditionally played with cards. A key element of the game of poker, for instance, is to hide one's cards from other players, and at least one court has stated that electronic simulations of poker are not in fact "poker" as that game is historically understood. See *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138, 676 P.2d 779, 781 (1984) ("[Poker] is a game played with playing cards, not with electronic images displayed on a screen."), superseded by statute as stated in *MPH Co. v. Imagineering, Inc.*, 243 Mont. 342, 792 P.2d 1081, 1085 (1990). These elements of secrecy and skill, however, are lacking in pull tabs, and we do not believe that physically handling cards is a fundamental characteristic of the game. Consequently, Plaintiffs' electronic games, which replicate all of the essential elements of pull tabs, are pull tabs as that game was commonly known in 1981, and as such are allowed under the Act. Cf. *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633, ***527** 636 (D.C.Cir.) (under federal statute, electronic pull-tab machine was classified as an electronic facsimile of a game of chance because it "exactly replicates the paper version of the game"), cert. denied, ____ U.S. ____, 114 S.Ct. 2709, 129 L.Ed.2d 836 (1994).

[5][6] In addition, we do not believe that the fact that the machines were found by the trial court to be "glamorous and enticing" means that they are prohibited by the Act. We interpret the Act to allow for that form of gambling commonly known as pull tabs, and a glamorous and enticing version of the game does not change its essential character. Finally, because we believe the Act unambiguously allows for the operation of Plaintiffs' electronic pull-tab games, we do not defer to the Department's regulations concerning the games. See New Mexico Pharmaceutical Ass'n v. State, 106

N.M. 73, 75, 738 P.2d 1318, 1320 (1987) (persuasive weight will be given to an administrative agency's interpretation of an ambiguous statute, but a reviewing court will overturn an agency's incorrect interpretation).

In sum, we hold that the language of the Act as written allows for the operation of plaintiffs' electronically simulated pull-tab games. If the legislature intended otherwise it can easily make that intent clear. See, e.g., 25 U.S.C.A. §§ 2703(7)(A)(i) (specifically addressing electronic and computerized bingo); 2703(7)(B)(ii) (prohibiting certain "electronic or electromechanical facsimiles"); La.Rev. Stat.Ann. § 33:4861.17(F) (West Cum.Ann.Pocket Part 1994) (addressing electronic and computerized bingo); Me.Rev.Stat.Ann. tit. 17, § 330(1-A) (West Cum.Pocket Part 1993) (specifically addressing electronic video machines); see also *TBCH, Inc. v. City of Albuquerque*, 117 N.M. 569, 572, 874 P.2d 30, 33 (Ct.App.1994). Further, if the Department believes that the games should only be allowed in their paper form, it should take that argument to the legislature rather than to this Court. See American Legion, 106 N.M. at 788, 750 P.2d at 1114 (Act may be changed through legislative therapy, not judicial surgery).

CONCLUSION

The judgment of the trial court is reversed.

IT IS SO ORDERED.

MINZNER, C.J., and APODACA, J., concur.

INFINITY GROUP, INC., NEW MEXICO AMATEUR HOCKEY ASSOCIATION

v.

MANZAGOL (JERRY), SUPERINTENDENT, REGULATIONS AND LICENSING DEPARTMENT OF STATE OF NEW MEXICO

NO. 22,412

Supreme Court of New Mexico

Oct 18, 1994

Certiorari Denied.

(The decision of the Court is referenced in the Pacific Reporter in a table captioned "Supreme Court of New Mexico Denials of Certiorari.")